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NO. 87-

In The
Supreme Court of the United States
October Term, 1987

Arkansas State Board of Education, Jeff Starling, Earle Love, Robert L. Newton, L.D. Harris, Harry P. McDonald, Alice L. Preston, Elaine Scott, Walter Turnbow, and Nancy Wood,

Petitioners,

v.

Little Rock School District; Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Wayne Joshua; Rev. Robert Willingham; Sara Matthew as next friend of Khayyam Davis and Alexa Armstrong, Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr., and Brian Taylor; Rev. John M. Miles, as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of the NAACP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACP,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER, CONSISTENT WITH THE ELEVENTH AMENDMENT, A STATE CAN BE DIRECTED TO FUND PART OF A LOCAL SCHOOL DISTRICT'S DESEGREGATION REMEDY WHEN NOTHING MORE THAN THE MERE PAYMENT OF MONEY IS REQUIRED OF THE STATE AND NO FINDING IS MADE THAT THE LOCAL SCHOOL DISTRICT IS UNABLE TO FUND THE REMEDY.

II

WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS HAS ACTED IN CONFLICT WITH THE HOLDINGS OF THIS COURT IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE DISTRICT COURT AS TO THE APPROPRIATENESS OF STATE FUNDING OF COMPENSATORY AND REMEDIAL EDUCATION PROGRAMS FOR THE LITTLE ROCK SCHOOL DISTRICT.

III

WHETHER THE EIGHTH CIRCUIT COURT OF APPEALS, IN EXPANDING ITS INITIAL 1985 DIRECTIVE FOR STATE FUNDING OF COMPENSATORY AND REMEDIAL EDUCATION PROGRAMS FOR FOUR SCHOOLS IN THE LITTLE ROCK SCHOOL DISTRICT TO A 1988 DIRECTIVE FOR STATE FUNDING OF SUCH PROGRAMS FOR ALL SCHOOLS IN THE LITTLE ROCK SCHOOL DISTRICT, WITHOUT

ANY FINDING OF ADDITIONAL CONSTITUTIONAL VIOLATIONS BY THE STATE, HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

LIST OF PARTIES

The parties to this proceeding will be:

(1) Petitioners: Arkansas State Board of Education, Jeff Starling, Earle Love, Robert L. Newton, L.D. Harris, Harry P. McDonald, Alice L. Preston, Elaine Scott, Walter Turnbow, and Nancy Wood

(2) Respondents: Little Rock School District; Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Wayne Joshua; Rev. Robert Willingham; Sara Matthew as next friend of Khayyam Davis and Alexa Armstrong; Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Pa[illegible]ha Taylor, Hilton Taylor, Jr., and Brian Taylor; Rev. John M. Miles, as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of the NAACP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACP

(3) Intervenors: Katherine Knight, individually and as President of the Little Rock Classroom Teachers Association (LRCTA); LRCTA; Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; Milton Jackson, individually and as a Non-Certified Educational Support Employee of the Little Rock School District

(4) Other Parties: Pulaski County Special School District No. 1; North Little Rock School District; Murry Witcher; Ginny Jones; Vicki Stephens; Dixie Harrison; Larry Lazenby; and Rose Wilshire

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CONSTITUTIONAL PROVISION:

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NO. 87-

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioners, the Arkansas State Board of Education and the members of the Board, pray that the Court grant this petition to review a decision of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

This appeal is from the most recent opinion of the United States Court of Appeals for the Eighth Circuit in this protracted litigation. *Little Rock Sch. Dist. v. Pulaski Cty. Sp. School*, 839 F.2d 1296 (8th Cir. 1988). A copy of the judgment is included in the Appendix.

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JURISDICTION

The judgment of the Court of Appeals that is the subject of this petition was entered on February 9, 1988. A timely petition for rehearing was filed on February 22, 1988. The petition was denied on March 24, 1988. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). Petitioner believes that the Court should grant certiorari to review a federal appeals court decision that is in conflict with rulings on the same issues by another federal court of appeals, that is in conflict with rulings of the Court and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

—o—

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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STATEMENT OF THE CASE

This case represents one part of a school desegregation case that was originally filed in 1982 with 28 U.S.C. §§ 1331(a), 1343(3) and (4), 2201, and 2202 as its basis for federal jurisdiction.[1] However, questions concerning a dual school system in the Little Rock School District ("LRSD") have been in litigation since 1957. The question here is not whether the LRSD should be desegregated, but whether the State of Arkansas, through the State Board of Education ("State"), has been properly ordered to bear the costs of compensatory education programs ordered by the Eighth Circuit.

At the beginning of the 1981-82 school term it was noted that the percentage of black students in the LRSD had risen to 65% from 48% in 1973. At the elementary school level, the LRSD was 76% black. This increase occurred despite a reorganization plan implemented pursuant to litigation that preceded this case. See *Clark v. Board of Education*, 705 F.2d 265 (1983).

In December, 1981, the Board of the LRSD received a report from a Desegregation Assistance Team from Stephen F. Austin State University that proposed adjustments in the desegregation plan. *Clark*, 705 F.2d at 268. The team also proposed improvements in the quality of education with the aim of reducing the disparity between the achievement of black and white students. Five plans were developed to implement these goals. The plan adopted by the LRSD established, among other things,

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[1] *Little Rock School Dist. v. Pulaski Cty. Spec. Sch. Dist.*, 584 F. Supp. 328, 352 (E.D. Ark. 1984).

nine neighborhood elementary schools and 17 paired schools. 705 F.2d at 269. Four of these schools were essentially all-black. *Id.* The District Court deemed the plan to be constitutional. The Eighth Circuit affirmed. *Clark v. Board of Education*, 705 F.2d at 273.[2] In doing so, the Court placed upon the LRSD the responsibility to implement a plan that would provide integrated learning experiences for the students attending the all-black schools. The Court also required LRSD to provide the District Court with detailed evaluations of the equality of programs throughout the school system. *Id.* Thus, the Eighth Circuit placed upon the LRSD the responsibility of implementing programs to assure that students in these four schools received an equal educational opportunity. 705 F.2d at 272.

In this litigation, LRSD contended that the Pulaski County Special School District No. 1 ("PCSSD"), the North Little Rock Special School District ("NLRSD") and the State had contributed to the segregation of the LRSD. The relief sought by the LRSD included consolidation of the school districts. After lengthy hearings, the Honorable Henry Woods of the United States District Court for the Eastern District of Arkansas, ordered the school districts consolidated. *Little Rock School District*

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[2]While the Eighth Circuit confirmed the constitutionality of the desegregation plan, it expressly noted that it was not commenting upon the merits of the present litigation (which had been recently filed). 705 F.2d at 271, n. 10.

v. Pulaski Cty. Spec. Sch. Dist., 597 F. Supp. 1220 (E.D. Ark. 1984).

The order of consolidation was reversed. *Little Rock School District v. Pulaski Cty. Spec. Sch. Dist.*, 778 F.2d 404 (8th Cir. 1985). In doing so, District Court was ordered to conduct hearings that sought a less drastic remedy. The District Court was also provided with eight guidelines to be followed in fashioning a new remedy. 778 F.2d at 435-436.

Of the guidelines provided by the Eighth Circuit, four conceivably could require payments by the State. These are: (1) payments for remedial or compensatory programs if the four all-black schools allowed in *Clark* were retined by the LRSD; (2) transportation costs for voluntary majority-to-minority ("M-to-M") transfers; (3) one-half the cost, above traditional amounts already paid, for students attending magnet schools; (4) one-half the costs of construction or rehabilitation of magnet schools. In fashioning this remedy the Eighth Circuit referred the District Court to the compensatory and remedial programs the Eighth Circuit requires in *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir. 1984) for further guideance. No assessment was made of any programs established by the LRSD under the *Clark* mandate.

On remand the District Court approved stipulations allowing M-to-M transfers, and approved the State's commitment to pay the entire cost of these transfers. The Court also approved an agreement concerning magnet schools and the State's commitment to bearing a substantial part of the associated costs. The District Court stated that the stipulations were an excellent compromise. *Little*

Rock School District v. Pulaski Cty. Spec. Sch. Dist., 659 F. Supp. 363, 365 (E.D. Ark. 1987).

As to State financing of remedial and compensatory programs in all-black schools, the District Court noted that under the then proposed LRSD student assignment plan no such schools should exist. Since the predicate for requiring the State to fund such programs was not triggered, no payments for compensatory education were required. *Little Rock School District*, 659 F. Supp. 366-367. Besides, the District Court noted that pursuant to newly adopted State educational standards, all students that failed to perform up to the statewide standards would receive compensatory educational assistance. *Id.*

In addition, the District Court noted that the implementation of the new state standards along with the State's commitment to assist in funding the magnet schools, would "strain the already meager resources of the State. . . ." *Little Rock School District*, 659 F. Supp. at 366.

In reversing, the Eighth Circuit did not discuss or even mention these bases for the District Court's opinion. *Little Rock School District v. Pulaski Cty. Spec. Sch. Dist.*, 839 F.2d 1296 (8th Cir. 1988). This reversal is the basis for this petition.

The Eighth Circuit first changed the definition of a racially identifiable school. Under this new definition, the racially identifiable schools expanded to seven. The Court declared that the State must bear all of the costs of compensatory and remedial education programs in these seven schools. Then the Court stated that, upon application by the LRSD and Joshua Intervenors, students in other LRSD schools will also be entitled to such programs

and remanded to the District Court the question of the types of programs to be implemented and whether the State should bear all or part of the costs of similar additional programs system-wide in non-racially identifiable schools. 839 F.2d at 1308. There are currently 46 non-racially identifiable schools in the LRSD.

A timely petition for rehearing and suggestion for rehearing *en banc* was filed on February 22, 1988. This petition was denied on March 24, 1988. A motion to recall the mandate pending appeal to this Court was also denied.

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REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER AN ASSESSMENT OF COSTS AGAINST A STATE FOR DESEGREGATION PROGRAMS IS BARRED BY THE ELEVENTH AMENDMENT WHEN THE DIRECTIVE IS MERELY TO PAY MONEY AND THE PAYMENT IS NOT ANCILLARY TO OTHER AFFIRMATIVE RELIEF AGAINST THE STATE.

The Eighth Circuit's directive to the State both in the 1985 opinion when projecting the possibility of compensatory education programs for the four *Clark* schools and in the 1988 opinion when applying such programs to every school in the LRSD, is merely to pay money. In 1985, the Eighth Circuit *en banc* said:

> If the four all- or nearly all-black elementary schools as conditionally allowed by this Court in *Clark* . . . are

> retained in LRSD, compensatory and remedial programs of the type that we required for the nonintegrated schools in St. Louis shall be put into effect for the four schools. See *Liddell v. State of Missouri*, 731 F.2d at 1312-18. *The additional costs of these programs shall be paid for by the State of Arkansas.*

(Emphasis supplied), 778 F.2d at 435.

In 1988, the three-judge panel said the State should pay all of the costs of compensatory and remedial programs in seven racially identifiable schools (as redefined by the Court to be 81% or more black) and some portion of the costs of such programs in the non-racially identifiable schools (i.e., every other school in the LRSD). The district court is directed to:

> [D]etermine what part of the funding of such [compensatory and remedial] programs shall be paid for by the State. . . . Some parts of the plan may be appropriate for full State funding, other parts may be split between the State and the LRSD.

839 F.2d at 1308.

The only directive to the State in this remedy is to simply pay money. A similar situation was before the Sixth Circuit in *Kelley v. Board of Education of Nashville and Davidson County*, 836 F.2d 986 (1987). In *Kelley*, Davidson County, Tennessee was the subject of a desegregation action and, after liability had been assessed against the county, it brought a third party action against the State of Tennessee seeking payment by the State of certain desegregation costs. The district court ordered the State to assume 60% of the costs of the county's desegregation program, relying on the United States Supreme Court case of *Milliken v. Bradley*, 433 U.S. 267 (1977), the

case relied upon by the Eighth Circuit here. The Sixth Circuit reasoned that the monetary relief granted in *Milliken* was not barred by the Eleventh Amendment as it was merely ancillary to other relief required of the State:

> The payment of money was not perceived to be all that was required of the state defendants in *Milliken*. As we noted in our own opinion in that case, 540 F.2d 229, 240 (6th Cir. 1976), 'the District Court directed that the Detroit Board *and the State* put into effect certain comprehensive programs which were found to be essential to the success of the desegregation effort' (Emphasis supplied). That understanding was shared by the Supreme Court; the Court's opinion notes that 'the [district] court directed the Detroit Board *and the State Department of Education* to institute a testing program,' and 'the [district] court ordered the Detroit Board *and the state defendants* to institute comprehensive programs as to the four educational components [of the desegregation plan]' 433 U.S. at 276-77, 97 S.Ct. at 2755 (emphasis supplied).

836 F.2d at 991-92.

The Sixth Circuit noted that in *Milliken*, the Supreme Court permitted the award against the State of Michigan as the district court's decree "fit squarely within the prospective-compliance exception" carved out of the "sovereign immunity doctrine". The order was, thus, within the district court's constitutional power as the Supreme Court subsequently explained "even though accompanied by a substantial ancillary effect on the state treasury". *Id.* at 992.

The Sixth Circuit distinguished *Milliken* on the basis that the district court's order in Tennessee was "not ancillary to anything at all" and therefore goes beyond

Milliken. Id. The Eighth Circuit's order for the State of Arkansas to pay money for compensatory education programs is no more connected to any other command of the Eighth Circuit than was the Tennessee district court's order for the State of Tennessee to pay 60% of the county desegregation plan. Accordingly, the writ should be granted to resolve the divergent treatment given the Eleventh Amendment sovereign immunity doctrine in the Sixth and Eighth Circuits.[3]

II.

THE COURT SHOULD GRANT THE WRIT TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHEN FEDERAL COURTS CAN ORDER A STATE TO PAY ANY OF THE COSTS ASSOCIATED WITH IMPLEMENTATION OF A LOCAL SCHOOL DESEGREGATION PLAN.

Another reason for granting the writ is to resolve a conflict among the circuits as to whether a state may be required to fund a local desegregation plan without a predicate showing that the local school board is incapable of funding the entire program. Compare this case, where the State is being required to pay part of the costs with *Kelley v. Bd. of Educ. of Nashville, supra*, where the shift of financial burden to the State to pay costs was held not within the province of federal courts.

The Eighth Circuit has never determined that the LRSD is incapable of meeting the cost of abolishing a dual

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[3]Indeed, the Eighth Circuit has internal conflict. Compare *Miener v. State of Missouri*, 673 F.2d 969 (8th Cir. 1982) (compensatory education programs for handicapped person prohibited by Eleventh Amendment as merely an award of money damages).

school system without financial aid from the State. The Sixth Circuit has suggested that such a finding should be made before a federal court is justified in ordering payments from the state treasury. *Kelley*, 836 F.2d at 995-96. This Court should grant the writ to resolve which of these approaches is correct.

To be sure, *Kelley* dealt with a situation in which the desegregation plans had been in effect for some time before the District Court ordered the State of Tennessee to bear some of the costs of desegregation. However, the thrust of the Sixth Circuit's rejection of the District Court order is that it is a matter of legislative discretion, not judicial determination, to establish who pays the cost of court ordered desegregation—i.e., the local taxpayer or the state taxpayer.

> As long as [the] costs [of desegregation] are paid, we see no justification for an unelected judiciary making policy judgments as to how the tax burden shall be allocated.
>
> To date, at least, the judgment of the Tennessee legislature has been that school integration costs ought not be shifted from the taxpayers of individual school districts to the taxpayers of the state at large. The wisdom of that judgment is doubtless debatable . . . No matter how desirable we may think a shift in the tax burden would be, the accomplishment of such an end cannot justify resort to unconstitutional means. For us to assume a 'legislative role . . . would be to assume a role for which the court lacks both authority and competence.'

Kelley, 836 F.2d at 996.

In this case the State has stipulated that it will help pay the costs of constructing and operating certain magnet

schools and other desegregation costs relating to transportation. It has objected to having to pay the costs of compensatory education programs. As discussed below, part of this objection is due to the fact that the State has provided for compensatory education programs throughout the State through the adoption of state standards for local school districts.

But the question for this Court to resolve is whether a federal court should make a predicate finding that a local school district is incapable of meeting desegregation expenses before a state is ordered to pay all or part of the costs of such a plan. This question is particularly relevant in the post-*Milliken* era as federal courts are expanding their authority to fashion particular remedies against states costing many millions of dollars. See, e.g., *Liddell v. Missouri*, 731 F.2d 1294 (8th Cir.), cert. denied, 469 U.S. 816 (1984) and *Jenkins v. Missouri*, 807 F.2d 657 (8th Cir. 1986).

In short, the Sixth Circuit seems to recognize that despite the dictates of *Milliken*, a state cannot be ordered to share the costs of desegregation until the federal courts have concluded that its broad remedial powers cannot otherwise be used to meet those costs. The Sixth Circuit has taken the approach that federal courts may not intervene to order state payments at least until it is obvious that the necessary programs will not otherwise be funded.

This Court should grant certiorari to determine which approach is the correct approach.

III.

THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE EIGHTH CIRCUIT HAS WRONGFULLY EXPANDED THE REMEDY AGAINST THE STATE FROM ITS EARLIER DECISION LIMITING SUCH REMEDY TO THE FUNDING OF COMPENSATORY AND REMEDIAL EDUCATION PROGRAMS IN FOUR ALL-BLACK OR NEARLY ALL-BLACK ELEMENTARY SCHOOLS TO (1) FULLY FUNDING SUCH PROGRAMS IN SEVEN SCHOOLS HAVING 81% OR HIGHER BLACK ENROLLMENT AND (2) AND PARTIALLY FUNDING SUCH PROGRAMS IN ALL OTHER DISTRICT SCHOOLS, ALL WITHOUT GIVING DUE DEFERENCE TO THE DISTRICT COURT'S DETERMINATION THAT SUCH REMEDY IS NOT APPROPRIATE IN THIS CASE.

The United States Supreme Court has emphasized that "[i]n fashioning and effectuating the [desegregation] decrees, the courts will be guided by equitable principles." *Milliken v. Bradley*, 433 U.S. 267, 280 (1977), quoting *Brown v. Board of Education*, 349 U.S. 294, 300 (1955). The Court further noted that in the "[a]pplication of those 'equitable principals' . . . like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken* at 280 citing *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971).

> The well-settled principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropri-

> ate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation . . . or if they are imposed upon governmental units that were [not] involved in . . . the constitutional violation.

Milliken at 281-82.

The Supreme Court has held that the remedial powers of the federal courts may "be exercised only on the basis of a violation of the law and could extend no farther than required by the nature and extent of that violation." *General Building Contractors Association v. Pennsylvania*, 458 U.S. 375, 399 (1982) quoting *Hills v. Gautreaux*, 425 U.S. 284, 294 n.11 (1976); See also, *Milliken v. Bradley*, 418 U.S. 717 (1974); *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971). Thus, once a party's liability has been established and the correspondent remedy applied, it is the law of the case and that ruling should stand. Liability should not be expanded without further findings of fact that new violations require expansion of the remedy.

The expansion of the remedy against the State Board to fund compensatory and remedial education programs beyond *Clark v. Board of Education of Little Rock*, 705 F.2d 265 (8th Cir. 1983), misapprehends and is in conflict with the confines of the remedy directed by the Court's *en banc* opinion of November 7, 1985, which made findings of both interdistrict and intradistrict (See *Little Rock School District v. Pulaski Co. Sp. School Dist. No. 1, et al.*, 778 F.2d 404, 436 n.21) constitutional violations by the State in the past. That opinion stated that it had designed a remedy "closely confined to one that will remedy *violations found to exist*." 778 F.2d at 434 (emphasis added).

Thus, the State Board (and the district court) believed it was completely satisfying its constitutional obligations by stipulating to and funding the implementation of various magnet schools and other remedies required of it by the 1985 opinion. The question of whether compensatory programs for the four *Clark* schools were to be a State Board obligation was to await the Little Rock School District ("LRSD") plan for implementing the 1985 decision.

In that 1985 decision, the Eighth Circuit ordered LRSD and the Pulaski County Special School District realigned through boundary changes that would result in the availability of more white students to further desegregate the Little Rock School District. The Court gave the LRSD the option of retaining the four all (99%) or nearly all-black (96%) elementary schools as conditionally allowed in *Clark*, adding that if the schools were to be retained in that status, compensatory programs of the type required in the non-integrated schools in *Liddell v. Board of Educ. of City of St. Louis*, 758 F.2d 290 (8th Cir. 1985), would be put into effect in those four schools at the expense of the State.

It is significant to recall the circumstances under which the *Clark* schools were established. The actual LRSD enrollment figures for 1982 found in the *Clark* Appendix indicate that *only three* elementary schools were above the Court's current racially identifiable standard of 81% or more. Those three were McDermott (81%), Garland (82%) and Gibbs (83%). 705 F.2d at 273. Yet, the LRSD in its 1983 partial K-6 plan voluntarily established four all-black (99%) or nearly all-black (96%) elementary schools, Carver, Ish, Mitchell and Rightsell, respectively. *Id.* at 270.

In 1983, this Court affirmed the lower court's determination that the creation of these four schools was not a constitutional violation as long as there were equal educational opportunities for students attending the schools, the students had the option of attending a desegregated school and there was a plan to promote integrated learning experiences for these students. *Id.* at 272-73, citing *Adams v. United States*, 620 F.2d 1277, 1296 (8th Cir.), *cert. den.* 449 U.S. 826 (1980). Because the four *Clark* schools were voluntarily created by the action of the LRSD operating under the option afforded them by the Eighth Circuit, and not by any unconstitutional acts or inactions of the State, it is peculiar that the Eighth Circuit decided in 1985 that *Liddell* type compensatory programs, funded by the State, should be added to the programs approved in the 1983 *Clark* opinion, particularly without additional findings as to new violations and resultant needs in those schools. However, this appeared to the District Court on remand to be a moot issue because the LRSD's March, 1986, assignment plan for the 1987-88 school year (prepared after the school district boundary adjustments ordered by the Eighth Circuit) was designed to eliminate all racially identifiable schools. Under the plan, no school would exceed 72% black. The District Court noted this aspect of the LRSD plan in 1987 and ruled that the State would not be liable for compensatory or remedial education programs for this and other reasons set forth below. *Little Rock School District v. Pulaski County Special District No. 1, et al.*, 659 F.Supp. 363, 366 (E.D. Ark. 1987).

However, LRSD's implementation did not match its 1986 plan. Instead of the elimination of racially identifiable schools, seven elementary schools in the LRSD ended

up with black enrollments of 81% or more. There have been no findings by any court on the issue of why the plan resulted in more schools in 1987 with 81% or above black enrollments than those three shown in the *Clark* Appendix for 1982. This doubling of racially identifiable schools is particularly surprising since the boundary adjustments mandated by the Eighth Circuit in 1985 made more white students available to desegregate LRSD schools. In the absence of additional findings, logic dictates that the additional racially identifiable schools are the result of faulty implementation of the LRSD plan. Yet, the Eighth Circuit panel, in directing the State Board to pay for compensatory programs for all LRSD schools above 81% black, did not place responsibility on the LRSD for the racial imbalance. Instead, the opinion places a staggering financial burden for such programs on the State Board over a minimum period of seven years. 839 F.2d at 1305, n.18.

The Eighth Circuit opinion did not stop there. In addition, the opinion also allows the Joshua Intervenors and the LRSD to apply to the District Court for additional compensatory programs for schools which are not racially identifiable and to have the District Court further determine what portion of such funding will be paid by the State. 839 F.2d at 1308-9. Thus, the remedy has expanded from the four schools referenced in 1985 to every school in the LRSD. This extreme expansion of remedy, without any finding of additional constitutional violations by the State between the 1985 and 1988 opinions has so far departed from the law of the case and the accepted and

usual course of judicial proceedings as to call for an exercise of this court's power of supervision.[4]

As stated above, the District Court found in 1987 that this is not an appropriate case for State funding of compensatory and remedial education programs:

> Since there are no all-black schools in the LRSD student assignment plan, the conditions are not present which would trigger state financing of compensatory education as is obvious from the above language. The Little Rock District has requested other funding from the State. None of the funding is required by the [1985] Court of Appeals ruling. The State's share of the magnet school funding will be considerable. It will strain the already meager resources of the State at a time when the State has committed itself to new standards for all Arkansas public schools. Although the blacks in Little Rock have suffered from the ravages of segregation, so have the blacks in every section and every county of the State. Significantly the new state standards provide for compensatory education for all students where performance is substandard. (State Exhibit MX 25).

659 F. Supp. at 366.

The Eighth Circuit has previously stated that it will not reverse the District Court unless it is found to be clearly erroneous and noted the Supreme Court's emphasis on this standard "in civil rights cases and more particularly, in school desegregation cases: [where] federal trial judges [are] uniquely situated . . . to appraise the societal forces at work in the communities where they sit." *Little Rock School District v. Pulaski County Special School Dis-*

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[4]Rule 17.1.(a) of the Rules of the United States Supreme Court (1980).

trict No. 1, et al., 778 F.2d 404, 411 (8th Cir. 1985) citing *Columbus Board of Education v. Penick*, 443 U.S. 449, 470 (1979).[5] Yet the Eighth Circuit has not given the trial court this deference with regard to the liability of the State. It has substituted its own judgment for that of the District Courts regarding the scope of the remedy without finding the District Court to be "clearly erroneous" and without even mentioning the considerations of the existing state efforts and its meager resources considered important by the District Court.

This Court should grant the writ (1) to correct a failure to apply the Supreme Court's holdings governing the review of a district court in a civil rights case, (2) to correct the deviation of the Eighth Circuit from the law of the case it established in its 1985 decision, (3) to correct the drastic expansion of a previously determined remedy absent any findings to justify the expansion or (4) as an exercise of its power of supervision to correct a significant departure from the accepted and usual course of judicial proceedings.

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[5]A District Court finding should not be overturned on appeal absent a conclusion the finding is clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1404/1537/1750/1751/
1805/1806/1837/1921/2071/
2150/2180/2363-EA

Little Rock School District,	*	
	*	
Appellee,	*	
	*	
	*	
Lorene Joshua, et al.,	*	Appeals from the
	*	United States
Appellants,	*	District ~~Court~~ for
	*	the Eastern
Katherine Knight, etc., et al.,	*	District of
	*	Arkansas
vs.	*	
	*	
Pulaski County Special School	*	
District No. 1, et al.,	*	
	*	
Appellees.	*	

Petitions for rehearing en banc filed by appellees, State Board of Education and Pulaski County Special School District, were considered by the Court and are denied.

Petitions for rehearing by the panel are also denied.

March 24, 1988

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 87-1404, 87-1537, 87-1750, 87-1751, 87-1805
87-1806, 87-1837, 87-1921, 87-2071, 87-2180

Little Rock School District,	*	
	*	
Appellee,	*	
	*	
	*	
Lorene Joshua, as next friend	*	
of minors Leslie Joshua, Stacy	*	
Joshua and Wayne Joshua; Rev.	*	
Robert Willingham, as next	*	
friend of minor Tonya	*	
Willingham; Sara Matthews as	*	
next friend of Khayyam Davis,	*	
Alexa Armstrong and Karlos	*	
Armstrong; Mrs. Alvin Hudson	*	
as next friend of Tatia Hudson;	*	Appeal from the
Mrs. Hilton Taylor as next	*	United States
friend of Parsha Taylor, Hilton	*	District Court for
Taylor, Jr. and Brian Taylor;	*	the Eastern
Rev. John M. Miles as next	*	District of
friend of Janice Miles and	*	Arkansas
Derrick Miles; Rev. Robert	*	
Willingham on behalf of and as	*	
President of the Little Rock	*	
Branch of the NAACP; Lorene	*	
Joshua on behalf of and as	*	
President of the No. Little	*	
Rock Branch of the NAACP,	*	
	*	
Appellants,	*	
	*	
Katherine Knight, Individually	*	
and as President of the Little	*	
Rock Classroom Teachers	*	
Association (LRCTA); LRCTA;	*	

Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, Individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; Milton Jackson, Individually and as an Non-Certified Educational Support Employee of the Little Rock School District,

v.

Pulaski County Special School District No. 1; North Little Rock School District; Murry Witcher; Ginny Jones; Vicki Stephens; Dixie Harrison; Larry Lazenby; and Rose Wilshire; Arkansas State Board of Education; Wayne Hartsfield; Walter Turnbow; Harry A. Haines; Jim Dupree; Dr. Harry P. McDonald; Robert L. Newton; Alice L. Preston; Jeff Sterling; Earle Love, Mac Faulkner; Bob Moore; Don Hindman; Shirley Lowery; Sheryl Dunn; David Sain; Bob Stender; Grainger Williams; Richard A. Giddings; George A. McCrary; Buddy Raines and Dale Ward, Charles Stratton; Mildred Tatum; Benny O'Neill, Mack McAlister,

Appellees.

No. 87-2150

In Re: Little Rock School District,

Petitioner.

Submitted: November 3, 1987

Filed: February 9, 1988

Before HEANEY, ARNOLD, and WOLLMAN, Circuit Judges.

HEANEY*, Circuit Judge.

We are asked in this appeal to review several decisions of the United States District Court for the Eastern District of Arkansas bearing on the desegregation of the three school districts in Pulaski County. After a careful review of the record, we reaffirm our order of November 5, 1987. We further hold: (1) that the March 1987 student assignment plan of the Pulaski County Special School District does not meet constitutional standards and that a new plan must be submitted by that district; (2) that compensatory education plans fully funded by the State of Arkansas must be promptly instituted in those Little Rock

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*Judge Arnold wrote Sections I and II and contributed portions to other sections.

elementary schools that had a black student population equalling or exceeding 81% as of September 13, 1987; (3) that the District Court did not err in finding Little Rock School District in contempt for failing to comply fully with its orders relating to magnet schools and that the Joshua Intervenors will be given representation on the Magnet Review Committee; (4) that the District Court may set aside a negotiated teacher assignment plan only if the plan interferes with the overall plan to desegregate the schools of Pulaski County; (5) that the District Court's decision with respect to the relative seniority of former teachers of Pulaski County Special School District and Little Rock School District is vacated, and the parties are directed to proceed with arbitration unless the parties are able to resolve the dispute through negotiation; and (6) that in all other respects the decision of the District Court is affirmed.

Progress is being made towards establishing three independent but cooperating integrated school districts in Pulaski County. However, much remains to be done if all the children of that county, black and white, are at long last to receive the equal education entitled them. The lawyers, school board members, administrators, teachers, and parents can devote themselves to no nobler task than the quick and resolute removal of the last vestiges of segregation.

I. THE DECEMBER 12 SPECIAL ELECTION IN LRSD

Little Rock School District (LRSD) appeals the District Court's order mandating a special school-board elec-

tion for residents in two of its seven geographical zones on December 8, 1987.[1] The form and timing of elections to the LRSD Board of Directors came before the District Court after this Court ordered that a significant amount of land within the City of Little Rock, formerly part of Pulaski County Special School District (PCSSD), be assigned to LRSD. *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 778 F.2d 404, 435 (8th Cir. 1985) (en banc), *cert. denied*, — U.S. —, 106 S. Ct. 2926, 91 L.Ed.2d 554 (1986). Under Arkansas law, Ark. Code Ann. § 6-13-607 (1987), school districts which have an average daily attendance in excess of 24,000 must be divided into geographic zones for the purpose of electing school-board members. Before the adjustment of the boundaries between PCSSD and LRSD in 1985, LRSD's seven school-board members were elected at large; afterward, LRSD's enrollment increased beyond 24,000 as a result of its annexation of territory from PCSSD. Consequently, LRSD was obligated under state law to change its form of governance to representation by zones, and it submitted a proposal for doing this for approval by the District Court as part of its general desegregation plan in December, 1986.

The District Court issued an order on December 18, 1986, approving LRSD's election plan, which divides the District into seven contiguous zones of roughly equal population. No party has challenged the substance of LRSD's

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[1]This issue is raised in No. 87-2363. By opinion filed and judgment entered on November 5, 1987, 833 F.2d 112, we announced our decision affirming the order of the District Court. At that time we said that an opinion giving reasons for that result would be filed later. This is that opinion.

court-approved plan, nor does any party question the District Court's authority to review its terms. We therefore proceed on this appeal on the assumption that the District Court's 1986 approval of LRSD's plan was proper.

LRSD's present appeal concerns a one-time problem in managing the transition from at-large to zoned representation. The District Court approved LRSD's proposal to allow previously elected at-large incumbents to serve out their terms. Since the terms of LRSD board members are staggered, this provision created the temporary anomaly that seats previously held by at-large board members would become available to be filled by zone representatives only on a piecemeal basis. In other words, some zones would be able to place resident representatives on the Board before others. This comparative disenfranchisement of some LRSD zones appeared all the more acute in light of the fact that four of the seven zones lacked residents who served as incumbents at large.

To correct this apparent inequity, the District Court approved LRSD's proposal that the two seats which would become vacant in March, 1987, be filled by representatives elected from two "enhanced election zones," composed of pairings of the four zones which lacked resident incumbents. In March, 1987, LRSD Zones 1 and 6 jointly elected a resident of Zone 1; Zones 5 and 7 jointly elected a resident of Zone 5. Under LRSD's court-approved proposal, the next two vacancies on the board, open in March, 1988, would be filled by representatives elected, respectively, from Zones 6 and 7, the two zones without resident board members. At this point, each of the seven zones would have a resident serving on the board, and the transition

to LRSD's zoned representation plan could proceed without further complications.

Thus far, LRSD's baroque scheme for the transition between representation plans was uncontroversial. Two subsequent events disrupted this equilibrium. After the District Court's December 18, 1986, order approving LRSD's proposal for March 1988 elections for zones without resident incumbents, the Arkansas Legislature passed Act 969 of 1987, which changed the date of annual school elections in Arkansas from March to September. At about the same time, the LRSD superintendent resigned, and the LRSD board's selection process for a new superintendent began in July, 1987. Four LRSD patrons who reside in Zones 6 and 7 moved to intervene, concerned that the Legislature's six-month postponement of their zones' school-board elections would deny the voters in their zones' representation in the Board's "crucial" selection of a new superintendent.

The District Court issued an order on October 1, 1987, requiring the postponed elections for Zones 6 and 7 to be moved to December 8, 1987.[2] The Court did not end the terms of any incumbents, but instead provided that the LRSD Board would temporarily become a nine-member body between the December 1987 elections and the expiration of the terms of two incumbents in March, 1988. LRSD now appeals the District Court's order, claiming that the District Court abused its discretion by altering the state-

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[2]The order also provided that Zone 3 would elect a representative on December 8, 1987. This particular aspect of the District Court's order is not questioned by any party on this appeal.

imposed election date without evidence of an independent constitutional violation.

We affirm the District Court's order. We need not decide whether the federal Constitution requires LRSD to hold elections for Zones 6 and 7 earlier than September, 1988. The District Court's decision to move the election date up did not require a finding of liability for constitutional violation, since the court's October 1, 1987, order was merely an adjustment of the court's original approval of LRSD's plan to hold elections in March, 1988. No party is challenging either the wisdom of the court's original decision to approve LRSD's election plan or the court's authority to make such a decision. We conclude that the District Court was simply exercising its equitable power to administer remedial orders, and so we need determine only whether the court abused its discretion in advancing the date of the elections originally scheduled for March, 1988. We find no abuse of discretion in the court's minor adjustment of its otherwise unchallenged order approving LRSD's governance plan. Similarly, the District Court did not abuse its discretion in conditionally granting the Rayburn petitioners' motion to intervene for the purposes of arguing this appeal, especially since this intervention is now mooted by our disposition of the appeal on the merits.

It is true, as LRSD argues, that the District Court's order gives residents of Zones 6 and 7 some temporary edge in representation on the board for the three-month period between December, 1987 and March, 1988. For this period of time, residents of these two zones will have two resident board members, and two other board members,

though not residents of Zones 6 or 7, will have been chosen in an election in which those residents (along with residents of Zones 1 and 5) have voted. On the other hand, in the absence of action by the District Court, an additional six months (from March to September, 1988) would have passed before all zones had a resident representative. In either event, the original 1986 election plan could not stand unchanged because of the unforeseen action of the Legislature in changing the date of school elections. The District Court had a choice to make between different kinds of change in its original plan. Each choice involves some dislocation and arguably falls short of complete justice. In making the choice it did, the District Court deliberately weighed the competing equities and reached a conclusion that is within the limits of reasoned discretion. We affirm on this issue.

II. DISQUALIFICATION OF THE TRIAL JUDGE

We turn now to the arguments made by LRSD and the Joshua Intervenors that the District Court should have granted their motion for recusal.[3] Appellants argue, first, that recusal of the trial judge is mandatory under 28 U.S.C. § 455(b)(2), which requires federal judges to disqualify themselves "[w]here . . . a lawyer with whom [they] previously practiced law served during such association as a lawyer concerning the matter [in controversy]. . . ." During the trial judge's private law practice, one

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[3]Our opinion filed November 5, 1987, announced our decision not to require disqualification of the trial judge and gave a brief statement of reasons. This opinion elaborates on that statement.

of his law partners represented parties who ultimately participated as *amici curiae* in *Clark v. Little Rock School Dist.*, No. LR-C-64-55 (E.D. Ark., filed Nov. 4, 1964), and LRSD now argues that this fact triggers the recusal requirement of § 455(b)(2).

Along with *Zinnamon v. Pulaski County School Dist.*, No. LR-C-68-154 (E.D. Ark., filed Aug. 7, 1968), *Davis v. North Little Rock School Dist.*, No. LR-C-68-151 (E.D. Ark., filed Aug. 5, 1968), and the instant case, *Clark* is one of the cases involving intradistrict segregation in the school districts of Pulaski County. Although the *Clark* litigation is entirely dormant,[4] it is clear that the case forms part of the historical background of the dispute presented here.

In order to avoid the appearance of impropriety, the District Court (having first consolidated all the related cases) severed *Clark* from the consolidated litigation involving *Zinnamon*, *Davis*, and the present case, and returned it to the docket of another judge. LRSD's first line of attack is to argue that the court abused its discretion in severing *Clark*, and that the allegedly mandatory conslidation of *Clark* requires the court to recuse itself from the entire litigation. We are not persuaded. The consolidation and severance of related cases under Fed.

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[4]Most of the activity in *Clark* occurred within the first ten years after its commencement in 1964, and it was during this period that the trial judge's former law partner represented clients as *amici curiae*. The last ruling in *Clark* occurred in 1983. 705 F.2d 265 (8th Cir. 1983). As in any case involving equitable remedies, it is theoretically possible that some future violation could trigger further litigation in this case, but for all practical purposes, *Clark* must be considered closed.

R. Civ. P. 42 is a matter of judicial housekeeping for the District Court, and we have no reason to interfere with the management of its docket. In particular, we find no abuse of discretion in the court's decision to sever *Clark*, especially where LRSD's appeal fails to supply any compelling reason why justice requires the consolidation of these cases.[5] By severing *Clark*, the District Court enabled itself to continue handling the present interdistrict case, thus avoiding the ruinous delay, expense and confusion that assignment of a new judge would have caused.

We have previously held, in an appeal involving the same judge and the same connection with *Clark*, that where the trial court denies consolidation of a related case which might have provided a basis for recusal, ". . . it follows . . . that the 'matter in controversy' here cannot be the same . . . and that the statutory language on recusal . . . thus does not apply." *Patterson v. Masem*, 774 F.2d 251, 254 n.2 (8th Cir. 1985). *Patterson* involved an individual racial-discrimination suit by an employee of LRSD, and the Joshua Intervenors urge us to distinguish *Patterson* on the ground that this case is intertwined with *Clark* in a way that *Patterson* was not. Under the Joshua Intervenors' interpretation, the "matter in controversy" contemplated by the recusal statute may extend beyond the

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[5]For the same reasons, we reject the Joshua Intervenors' claim that the District Court erred when it originally granted LRSD's motion to consolidate the four desegregation cases in Pulaski County. Any harm to which the Joshua Intervenors point is largely speculative. If any realignment of the parties on certain issues is prudent, one of the parties may make a motion for such realignment when the need arises. On this record, however, the District Court has not abused its discretion in refusing to realign the parties.

litigation conducted under the same docket number where the issues in dispute are sufficiently related. Since this case inevitably involves consideration of desegregation within LRSD—the focus of the *Clark* litigation—the Joshua Intervenors conclude that § 455(b)(2) requires recusal.

Even if we accept appellants' argument that different cases may constitute the same "matter in controversy," an interpretation apparently precluded by *Patterson*, the question of what kinds of cases are sufficiently related for the purposes of § 455(b)(2) would remain a question of judgment and degree. We cannot say that the trial judge's former law partner's submission of an *amicus* brief in a case involving, to a large extent, different issues and different remedies two decades ago requires recusal under § 455(b)(2), nor do we believe that Congress intended such a result.

There is a more troubling ground for recusal urged by LRSD and the Joshua Intervenors. These appellants point to several instances of inappropriate conduct by the trial court over the past year, including the court's rejection of PCSSD's January plan without a hearing and its impromptu meeting with LRSD students at which the trial judge publicly criticized LRSD's teacher assignment plan prior to the issuance of his April 15th show-cause order. Appellants urge that the trial judge must be directed to recuse himself,[6] because "his impartiality might

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[6]The Joshua Intervenors raise this argument in the form of an appeal from the District Court's denial of their motion for recusal. LRSD brings the argument through a petition for mandamus directed to this Court seeking an order directing recusal, a petition supported here by the Joshua Intervenors.

reasonably be questioned" within the meaning of 28 U.S.C. § 455(a) as a result of his conduct.

At the outset, we note the irony that most of the major parties to this litigation have at some point sought the removal of the trial judge. Not surprisingly, the parties have generally discovered grounds for disqualification at approximately the same times that the District Court has ruled for their adversaries on the merits. The recusal statute does not provide a vehicle for parties to shop among judges. Nor does § 455(a) require recusal every time a judge commits a procedural error or departs from protocol in some way. If it did, it would be extremely difficult for any human being (a category that includes judges) to preside for the duration of a case as complex and protracted as this one.

The question posed in motions for recusal under § 455 (a) is not whether the trial judge committed errors, but whether these errors create a reasonable inference that the Court has lost its impartiality. This question must be answered ". . . in light of the full record, not simply in light of an isolated incident." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1184 (8th Cir.), *cert. denied*, 459 U.S. 988, 103 S. Ct. 342, 74 L.Ed.2d 383 (1982). While the District Court at times acted hastily and, we hold, erroneously, we do not find that these actions betray bias or partiality on the part of the trial judge.[7] No reasonable assessment

[7]Unlike the trial judge in *Reserve Mining Co. v. Lord*, 529 F.2d 181 (8th Cir. 1976), the District Court cannot reasonably be said " . . . to have shed the robe of the judge and to have

(Continued on following page)

of this grueling litigation, in light of the full record, would conclude that the District Court is predisposed to reject the claims of LRSD or the Joshua Intervenors. On the central issue before the Court in this case prior to remand—namely, the availability of consolidation as an interdistrict remedy—the District Court ruled for LRSD (a ruling we later reversed).

To say that the District Court's errors do not create an appearance of bias should not, in retrospect, obscure the fact that the court did commit errors, most notably in rejecting PCSSD's January plan without a hearing. We are especially disturbed by the language used by the court in announcing (in advance of any hearing on the question) that it would not approve PCSSD's January student assignment plan. Although the court disclaimed being influenced by public clamor, its open acknowledgement of the receipt of letters and phone calls (all *ex parte*) denouncing the plan left quite another impression. Constitutional rights are at stake here, and those rights exist (or not, as the case may be) independently of public opinion. The right most prominently involved here is the right to a public education free of racial discrimination. That right, like the right "to life, liberty, and property,

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(Continued from previous page)

assumed the mantle of the advocate." *Id.* at 185. In this sense, the conduct of the District Court more closely resembles that of the trial judge in *In re Federal Skywalk Cases, supra.* In that case, we found that the trial judge's ex *parte* communications with counsel concerning possible representation for a class which had not yet been certified were clearly improper. We found, however, that this impropriety did not indicate that the judge had lost the ability to act impartially, and we therefore refused to order his recusal.

to free speech, a free press, freedom of worship and assembly, and other fundamental rights[,] may not be submitted to vote; [it] depend[s] on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638, 63 S. Ct. 1178, 87 L.Ed. 1628 (1943).

It may be that public reaction to a student assignment plan should be taken into account, and that such reaction might be a factor, at the margin of decision, for choosing one plan above another. See *Clark v. Board of Education of the Little Rock School Dist.*, 705 F.2d at 271 ("Although the possibility of white flight and consequent resegregation cannot justify a school board's failure to comply with a court order to end segregation, . . . it may be taken into account in an attempt to promote integration.") (citations omitted). But to the extent that public reaction is relevant, what that reaction is is still a question of fact, to be decided by the District Court after appropriate notice and a full evidentiary hearing. Public outcry in response to media publicity may be uninformed, even distorted. It is not a reliable basis for adjudication. We reject respondent's position that public reaction was a proper subject for judicial notice. It is not the sort of "fact" that is either so clear-cut or so easily established as to justify short-circuiting the normal fact-finding process. The tensions which make strict adherence to the canons of judicial conduct so difficult—hostile public comment, destructive bickering between the parties—are the very reasons which make these procedural formalities so imperative. Advocates and parties need a predictable rule-based process for adversarial litigation, and the sudden appearance of less structured forms of dispute resolution, such as the

summary rejection of proposed remedies, inevitably disorients the participants.

Having said all this, we nevertheless believe firmly that the District Court's lapses resulted, not from bias, but from the more honorable impulse to cut through the tangle of litigation to reach effective solutions for the troubled school systems in Pulaski County. Although the District Court did commit errors, we are confident in the ability of the distinguished trial judge to continue adjudicating this trying litigation. We do not expect that the errors complained of will recur, and we deny LRSD's petition for mandamus and affirm the trial court's order denying recusal.

III. STUDENT ASSIGNMENTS IN PCSSD

On January 1, 1987, PCSSD submitted a student assignment plan (the January plan) based upon the new boundaries between PCSSD and LRSD established by the District Court pursuant to the mandate in *Little Rock School District v. Pulaski County Special School District*, 805 F.2d 815 (8th Cir. 1986) (per curiam). Based on the projected enrollments, the January plan would have provided that each school in PCSSD would range from 20% to 40% black[8] student population. At a hearing on magnet schools held on February 17, 1987, the District Court informed the parties, with out prior notice, that it would reject the January plan because of excessive busing and

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[8]One remote school, Bayou Meto, would remain virtually all-white, pursuant to an exception to district-wide desegregation ratios created by this Court in its en banc opinion. 778 F.2d at 435-36.

adverse community reaction.[9] The District Court reached this decision without conducting a hearing or taking any evidence. On March 5, PCSSD submitted a revised student assignment plan, which divided the District into three noncontiguous sectors of widely varying racial composition. Since the plan contemplated assigning students only to schools in the sector in which they reside, the projected enrollments reflected the racial makeup of the residents of each sector, rather than of the District as a whole. Under the March plan, the southeast sector of PCSSD would have

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[9]The Court stated in pertinent part:

> In fairness to the Pulaski County Board and officials of that District, I must advise you that I will not approve the student assignment plan submitted by the Pulaski County District.
>
> This plan contemplates an inordinate amount of busing of both black and white children. It has the violent opposition of a large segment of the patrons in the District, both black and white.
>
> My office has been flooded with mail and telephone calls in opposition to the proposed plan. While I do not decide cases in response to public clamor, it is obvious there must be some public support of a student assignment plan. Otherwise, white flight to private schools and to schools in other counties will destroy the racial balance we seek to achieve and seriously harm the well-being of the County School system.
>
> Contrary to impressions cultivated by some of your District officials and others with their own axes to grind, the Federal Courts have had no input whatsoever into the plan advanced by the Pulaski County District. This is not my plan or the plan of the Court of Appeals. In my opinion, it's a poor plan. I have repeatedly stated in open court that a minimum of busing should be employed as long as constitutional requirements are met.

a black student population of 50-55%,[10] while the southwest and north sectors would have schools averaging only 11% and 18% black enrollment, respectively. Over the objections of the LSRD and the Joshua Intervenors, the District Court approved PCSSD's March plan. *Little Rock School District v. Pulaski County Special School District*, 656 F. Supp. 504 (E.D. Ark. 1987) (order).

We reverse the District Court's approval of PCSSD's March plan, because the plan permits a constitutionally impermissible continuation of a dual educational system in PCSSD. Furthermore, we conclude that the District Court abused its discretion in rejecting the January plan without a hearing. While many details of PCSSD's original proposed remedy have yet to be worked out, we direct on remand that consideration of student assignment in PCSSD resume within the general outlines in the January plan, subject to appropriate modifications, including limits on busing time, which we discuss below.

Much of the confusion over the bounds of the acceptable variation from the district-wide average in the racial composition of school enrollments stems from a dispute over statistical method. In our en banc opinion, this Court ordered the school districts to revise their attendance zones so that each school would reflect the racial composition of its district, subject to a permissible variance of up to one-fourth of either race. 778 F.2d at 435. As a matter of simple arithmetic, however, it makes a great deal of difference whether the benchmark for the one-fourth variance

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[10]The southeast sector includes the largely black Granite Mountain area, which we held in our en banc opinion had been unconstitutionally deannexed from PCSSD to LRSD as a means of segregating black pupils in the LRSD. 778 F.2d at 427-28.

is the minority race or the majority race.[11] The District Court apparently calculated the ± 25% variance from the percentage of white students in the PCSSD when it held that the schools in the two predominantly white sectors were "well within the guidelines set by the Eighth Circuit's mandate." 656 F. Supp. at 506.

This Court did not intend its ± 25% guideline to allow such wide variations. Our en banc order directs that variation in the enrollments of each school may not exceed one-fourth the district-wide percentage of either race, and the minority race is here the statistically relevant focus of the variance. In concrete terms, this guideline, as applied to the 24% black PCSSD, translates to a presumptive permissible variation of 18-30% black enrollment in PCSSD schools.

We emphasize that our en banc opinion prescribed the one-fourth variance as a guideline for the subsequent remedy, and not as a rigid quota. "[T]he use made of mathematical ratios [is properly] no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 25 (1971). There are practical limits to the remedial use of desegregative student assignments, particularly where the time or distance of travel risks damage to the health and education of school chil-

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[11] If schools in the 76% white PCSSD are allowed to under- or over-represent the majority race by as much as one-fourth, the acceptable range would be 57%-95% white. On the other hand, if the variance is calculated as the range between three-fourths and five-fourths of the district-wide minority ratio, the acceptable range becomes 18%-30% black.

dren.[12] See *Swann*, 402 U.S. at 30-31. This Court has previously approved an assignment plan to de-segregate LRSD which would require transportation time of up to forty-five minutes each way, *Clark v. Board of Education of Little Rock School Dist.*, 465 F.2d 1044, 1046 n.5 (8th Cir. 1972), *cert denied*, 413 U.S. 923 (1973), and this forty-five minute limit on busing appears to be a sensible cap for purposes of desegregating PCSSD schools.

Against this background, we cannot affirm the District Court's approval of PCSSD's March plan. The variation in black enrollment from 11%-18% in the southwest and north to 50% in the southeast extends far beyond the acceptable variation outlined in our en banc opinion. In a system with a history of segregation, there is a need for specific and effective remedial criteria, and courts must apply a presumption of unconstitutionality against schools in previously segregated systems which remain substantially disproportionate in their racial composition. *Swann*, 402 U.S. at 26.

As a general rule, the geographic separation of black and white residential areas within the same school district does not release a constitutional violator from the duty to desegregate the district's schools as a unit. The local autonomous school district is the basic governmental unit of American public education; accordingly, respect for the autonomy of the school districts has been the chief reason that the federal courts have avoided ordering their dissolution as a remedy for interdistrict segregation. See

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[12]Hence our ongoing exception of the geographically remote Bayou Meto School, which is practically all white, from the general guideline.

Milliken v. Bradley, 418 U.S. 717 (1974) *(Milliken I)*; *Little Rock*, 778 F.2d at 434. Three years ago, PCSSD persuasively argued against its three-into-one consolidation with LRSD and NLRSD on the ground of status as an integral unit of local governance. For essentially the same reason, it cannot now defend its proposed one-into-three partition on the ground that it is incapable of implementing integral district-wide desegregation.

In this sense, PCSSD's tripartite March desegration plan resembles the remedy that the Supreme Court found inadequate in *Davis v. School Commissioners of Mobile County*, 402 U.S. 33 (1971). In *Davis*, the Fifth Circuit had ordered a desegration plan which divided Mobile County into two separate sections divided by the county's central highway, and which treated the desegregation of the schools in the 65% black east side and the 12% black west side of Mobile as two separate processes. The Supreme Court reversed, on the ground that the Fifth Circuit erroneously ". . . felt constrained to treat the eastern part of metropolitan Mobile in isolation from the rest of the school system, and that inadequate consideration was given to the possible use of bus transportation and split zoning." *Id.* at 38. PCSSD's March plan involves the same remedial shortcomings present in *Davis*, and we therefore reverse the District Court's order approving the plan.

On remand, the District Court should develop a remedy which does not create separate subdivisions within PCSSD, and which brings the racial composition of each PCSSD school (with the exception of Bayou Meto) within the permissible variance outlined here. As a preliminary matter, this formula appears to describe the general out-

lines of PCSSD's original proposed remedy—the January plan—which was improperly rejected by the District Court. We note that the Joshua Intervenors, who are the sole representatives of the victims of the constitutional violations at issue here, found the January plan to be conceptually satisfactory. Of course, we do not reach any conclusions in advance about the particular features of an appropriate student assignment plan for PCSSD—we simply direct that consideration of the remedy resume at the point it was erroneously interrupted in February 1987.

The District Court should conduct hearings and take evidence on any and all factors, including busing time, which may limit the effectiveness of the remedy. The District Court may allow deviation beyond the 18%-30% range in black enrollment if necessary to keep one-way busing times within the forty-five minute limit approved in *Clark*. In the hearings, however, PCSSD, as the past constitutional violator, must bear the burden of proving that its proposed plan ". . . promises realistically to work *now*," *Green v. County School Board*, 391 U.S. 430, 439 (1968), and that any limitations placed on the desegregative effect of the remedy are required to ". . . serve important and legitimate ends." *Dayton Board of Education v. Brinkman*, 443 U.S. 526, 538 (1979).[13] The hearing on remand should be conducted promptly, with a view to

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[13]We disapprove the District Court's procedural approach in the hearings leading up to its approval of the March plan. There the Joshua Intervenors bore the burden of presenting their expert witness, Dr. Stolee, to attack the March plan, and the PCSSD's expert witness, Dr. Welch, testified in rebuttal. The District Court erred in implicitly placing the burden on the Joshua Intervenors to disprove the effectiveness of the PCSSD's plan.

putting an effective student-assignment plan in place for school year 1988-89.[14]

IV. COMPENSATORY PROGRAMS IN THE LRSD

In this court's en banc opinion, we stated that:

> If the four all- or nearly all-black elementary schools as conditionally allowed by . . . *Clark v. Board of Education of Little Rock*, 705 F.2d 265 (8th Cir. 1983), are retained in LRSD, compensatory and remedial programs of the type that we required for the nonintegrated schools in St. Louis shall be put into effect for the four schools. *See Liddell v. State of Missouri*, 731 F.2d at 1312-18. The additional cost of these programs shall be paid for by the State of Arkansas.

Little Rock, 778 F.2d at 435.

On remand, LRSD developed a new student assignment plan. That plan modified the enrollment in the previously all-black schools to the point that no elementary school in LRSD was entirely black. Several schools, however, would be racially identifiable as black schools. LRSD asked the District Court to fund compensatory programs[15]

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[14]For this reason, among others, we are directing that our mandate issue forthwith. To avoid disruption, the plan now in use may remain in effect for the remainder of the school year 1987-88.

[15]The proposed compensatory programs were: Early Childhood Education; Compensatory Reading, Mathematics, and Learning Skills; Extended Day; Summer Learning Opportunities; Parent Education and Involvement in Schools; Guidance and Counseling; Social Work; Diagnosis and Prescription; Library/Media Services; and Alternative Schools. LRSD Desegregation Plan 114, 130-39.

in all LRSD elementary schools, contending that the black students in these schools were in need of compensatory and remedial training because they had been deprived of their constitutional rights for so many years. The District Court denied implementation and funding of the compensatory programs, concluding that "[t]here are no all-black schools in the LRSD student assignment plan, [and therefore] the conditions are not present which would trigger state financing of compensatory education . . ." *Little Rock School Dist. v. Pulaski County Special School Dist. No. 1*, 659 F. Supp. 363, 366 (E.D. Ark. 1987) (order).

In using the phrase "all- or nearly all-black," it was our intention to provide comprehensive remedial and compensatory programs to students in racially identifiable black elementary schools. A racially identifiable black elementary school has been defined as "[a] school having a black student enrollment in excess of the applicable range of variance from the system-wide percentage of black pupils . . . ." *Penick v. Columbus Board of Education*, 583 F.2d 787, 799 (6th Cir. 1978), *aff'd*, 443 U.S. 449, 99 S. Ct. 2941, 61 L.Ed2d 666 (1979). Applying this standard to the instant case, we define a racially identifiable black elementary school in LRSD as any elementary school that is 81% or more black (rounded up or down to the nearest whole number).[16]

In our view, the District Court erred in holding that the state was not obligated to fund remedial and compensatory programs in these racially identifiable elementary

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[16]Applying the same 25 percent minority variance that we did in Pulaski County (+/— 6 per cent) to the 75%-25% black-white ratio in LRSD elementary schools, we end up with the 81% standard.

schools in LRSD. This holding is consistent with precedent. *See Milliken v. Bradley*, 433 U.S. 267, 284-86, 97 S. Ct. 2749, 2759-60, 53 L.Ed.2d 745 (1977) *(Milliken II)*; *see also Liddell v. State of Missouri*, 731 F.2d 1294, 1312-18 (8th Cir.), *cert. denied*, 469 U.S. 816, 105 S. Ct. 82, 83 L.Ed.2d 30 (1984); *Arthur v. Nyquist*, 712 F.2d 809, 811 (2d Cir. 1983), *cert. denied*, 466 U.S. 936, 104 S. Ct. 1907, 80 L.Ed.2d 456 (1984); *Oliver v. Kalamazoo Board of Education*, 640 F.2d 782, 789-90 (6th Cir. 1980); *Evans v. Buchanan*, 582 F.2d 750, 767-69 (3d Cir. 1978) (en banc), *cert. denied*, 446 U.S. 923, 100 S. Ct. 1862, 64 L.Ed.2d 278 (1980). Such measures "are an integral part of a program for compensatory education to be provided Negro students who have long been disadvantaged by the inequities and discrimination inherent in the dual school system." *Milliken II*, 433 U.S. at 284, 97 S. Ct. at 2759.

The programs to be implemented in the racially identifiable black elementary schools in LRSD should be similar to those required for the non-integrated schools in St. Louis, *see Liddell*, 731 F.2d at 1312-18, but carefully tailored to meet the needs of Little Rock students. The most important element of the compensatory and remedial programs should be the reduction of class size in the racially identifiable black elementary schools to 20 pupils per teacher. This reduction must be achieved over a period of three years; other approved compensatory and remedial programs may be phased in over a reasonable period of time to be fixed by the District Court.

The racially identifiable black elementary schools shall be those having a black student population of 81% or more

as of September 13, 1987.[17] The elementary schools so identified shall continue to have that status for a period of years equal to the number of grades they contain, notwithstanding enrollment changes.[18] These limitations are imposed to discourage manipulation of enrollments within LRSD and should not discourage efforts on the part of LRSD to reduce the black population in these schools to the district-wide average.

LRSD and the Joshua Intervenors argue that compensatory and remedial programs should not be limited to racially identifiable schools. They point out that all black students, not just those in certain schools, have been victims of unconstitutional segregation. The point is well taken. In the Kansas City and St. Louis cases remedial programs were not limited to non-integrated schools, though we directed that they take a more intensified form in those schools. See *Jenkins v. State of Missouri*, 807 F.2d 657, 682-86 (8th Cir. 1986) (en banc); *Liddell*, 731 F.2d at 1316-19. The State of Arkansas is no less guilty

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[17]This date is selected because it appears to be the date as of which attendance was computed for state-aid-to-schools purposes. See Ark. Code Ann. § 6-18-213 (1987). We realize that some changes in racial ratios occurred later in the school year. These changes, however, did not have a pronounced effect on any of the racially identifiable schools, measured as of September 13, 1987. Any date selected will be arbitrary in some sense, but a definite date must be fixed to avoid manipulation and give the parties certainty as to what is being ordered.

[18]Thus, if a school contains grades K through six, the compensatory and remedial program at that school must last for at least seven years. In this way, students who enter kindergarten in the fall of 1988 will get the benefit of the program for their full time in a given school (assuming their assignment is not changed for some good reason).

of past constitutional violations than the State of Missouri and it should be liable for a comparable remedy.

In so holding we are not violating the law-of-the case doctrine or departing from the provisions of our previous en banc opinion in this case, as the State contends. If we place this case in context, the point becomes clear. The complaint that initiated the lawsuit was filed by LRSD against PCSSD, NLRSD, and the State. It sought relief for interdistrict violations of the Constitution by those defendants. It was not primarily concerned with intradistrict violations, or with the intradistrict effects of the defendants' acts. Therefore, the relief contained in our en banc opinion was designed to cure the interdistrict effects of what the defendants had done. It was not intended to address comprehensively the intradistrict effects in LRSD of State-imposed segregation and its residue. *See* 778 F.2d at 435 n.20, 436 n.21. But it cannot be denied that the State has also committed *intradistrict* violations, as a consequence of which the black children of LRSD (and the white children, too, for that matter) have been deprived, in varying degrees and from time to time, of their federal constitutional right to a desegregated public education. Accordingly, it is appropriate for relief to include compensatory and remedial programs in LRSD schools that are not racially identifiable.

According, the Joshua Intervenors and LRSD may apply to the District Court for additional compensatory or remedial programs in the non-racially identifiable schools at the elementary, junior high, and senior high levels. These programs need not include a reduction in class size but shall otherwise be generally comparable to those approved by this Court for implementation in the St. Louis

and Kansas City schools. Our St. Louis and Kansas City en banc opinions should also be used as guidelines for the funding of these programs. By referring to these opinions we do not mean to require that the details of the St. Louis and Kansas City programs be transplanted in their entirety to Little Rock. The District Court shall determine in its discretion what programs are necessary to remedy the effects of intradistrict segregation on students in the non-racially-identifiable schools. It shall determine what part of the funding of such programs shall be paid for by the State. Each entity responsible for the unconstitutional conditions should bear its fair share. Some parts of the plan may be appropriate for full State funding; other parts may appropriately be split between the State and LRSD.[19] The District Court should decide all these issues in the first instance.

On remand, LRSD shall promptly prepare and submit to the District Court its plan for compensatory and remedial programs in the racially identifiable black elementary schools and a time schedule for the implementation of these programs. If any party objects, the District Court shall conduct an evidentiary hearing and issue appropriate orders. If LRSD or the Joshua Intervenors move for other forms of compensatory and remedial relief, the District Court shall conduct an evidentiary hearing on this motion also and issue appropriate orders.

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[19]The programs of which we are now speaking—those in non-racially-identifiable schools—are the remedy for intradistrict violations committed by the State and LRSD. Accordingly, neither PCSSD nor NLRSD shall be required to pay any part of their cost.

V. MAGNET SCHOOLS

A. Background

In this Court's en banc opinion of November 7, 1985, we set forth in detail the interdistrict constitutional violations on the part of the State of Arkansas, PCSSD, and NLRSD. *Little Rock*, 778 F.2d at 427-429. (This Court had previously set forth the constitutional violations of LRSD in *Clark v. Board of Educ.*, 426 F.2d 1035 (8th Cir. 1970) (en banc), *cert. denied*, 402 U.S. 952, 91 S. Ct. 1608, 29 L.Ed.2d 122 (1971)).

We included in the remedy the establishment of magnets to alleviate the interdistrict violations:

> The district court may require a limited number of magnet or specialty schools or programs to be established at locations to be determined initially by a Magnet Review Committee and approved by the district court after a hearing. . . . The magnet schools, if ordered, shall be administered by a Magnet Review Committee with one person to be named by each school district and two persons to be named by the State of Arkansas. The State of Arkansas will be required to pay the customary state aid to any pupils attending these schools, plus an additional one-half of the cost of educating the students attending them. The local share of the cost of any magnet school established shall be paid by the three participating schools on a basis to be determined by the district court. The state shall also be required to pay one-half of the cost of the construction or rehabilitation necessary to house the magnet schools and the full cost of transporting the students who attend them.

Little Rock, 778 F.2d at 436.

We went on to state that the programs for the magnet schools should be similar to those described in *Liddell*, 731 F.2d at 1305-12:

> Magnet schools . . . will be distinguished by the features that have made them successful in other cities: individualized teaching, a low pupil-teacher ratio, specialized programs tailored to students' interests, enriched resources and active recruitment.

Little Rock, 773 F.2d 436 n.21.

We specifically noted in our en banc opinion that PCSSD and NLRSD had made thoughtful proposals for magnet schools and programs, with the expectation that the programs suggested would be seriously considered.[20]

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[20]PCSSD suggested twenty-nine program offerings:
the creation of a "substantial number of special schools and special program offerings . . . in each of the three present school districts," in addition to the traditional curriculum offered at "standard schools." * * * Suggested themes for specialty schools and programs in elementary schools include a gifted and talented program, a physical development program, a multi-language program, a lab school, a Piaget model school, an extended school day center, a Montessori school, a creative arts school, a personalized education program and a computer/science/math program. Junior High school themes include a gifted and talented program, visual communication, pre-international Baccalaureate program, physical development, arts program, ecology and environmental education, and math/science. Senior high school themes include college prep high school, high school for the performing arts, law enforcement program, engineering, communications, math/science, military academy, computer technology and business, electronics, drafting, ecology and environmental education, and a gifted and talented program.

. . . .

. . . "Specialty schools and specialty programs will be racially balanced at the countrywide proportion plus or minus five percentage points."

. . . .

. . . [f]aculty from all three districts [will be] recruited to teach in the specialty schools, and teachers accepting

(Continued on following page)

After the matter was returned to the District Court, the subject of magnet schools was considered and debated by the parties. The court held a number of hearings on the subject. Finally, on February 17, 1987, the three school districts in the county advised the District Court that they had stipulated to a magnet school plan for the county and that the plan had been approved by a Magnet Review Committee appointed by the District Court. The stipulation stated that the three magnet schools heretofore established by LRSD would continue in existence and that students currently attending those schools would have a right to complete the programs in which they were enrolled. The parties agreed to the immediate establishment of three additional magnet schools and agreed that any party could present applications for additional magnet schools or programs not later than the beginning of each school year preceding the proposed year of implementation. Under the plan, there were initially to be four elementary mag-

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> interdistrict assignments [will] maintain contractual relationships with their home districts but that they [will] be subject "to all other rules and procedures applicable to the schools in which they teach."

Id. at 430-31.

NLRSD suggested that ten to twelve magnet schools be established:

> . . . an interdistrict magnet school program and an interdistrict majority-to-minority (m-to-m) student transfer program to promote desegregation in the three districts. Ten to twelve magnet schools, which would offer programs such as computers, math and science and back-to-basic fundamental schools, would be located in central Little Rock.

Id. at 432.

nets, one junior high magnet and one senior high magnet, all to be located in LRSD. Set forth below is a list of the schools, the programs, the enrollment and the proportion of the enrollment allocated to each of the three county school districts:

Magnet Schools	*Initial Projection*	*Final Projection of Feb. 23, 1987*
ELEMENTARY		
Booker—fine arts	720	478
Carver—basic skills, math, science	475	478
Gibbs—foreign language, international studies	348	348
Williams—basic skills	530	432
	2,073	1,736
JUNIOR HIGH		
Mann—math, science, arts	975	1,194
SENIOR HIGH		
Parkview—arts, performing arts	1,150 (Dunbar)	792
TOTAL	4,198	3,722
Allocation of Magnet Seats		
Little Rock (shadow students—those living close to a magnet)	931	
(plus 43% of remainder—2,791)	1,200	2,131
Pulaski County (40% of 2,791)		1,116
North Little Rock 17% of 2,791)		475
		3,722

Under the agreement, and consistent with our en banc decision, the state was to pay one-half of the actual cost of the construction or renovation of magnet schools, as well as the customary state aid, and one-half the cost of educating the magnet students attending these schools.

The State agreed to underwrite the entire actual cost of transporting magnet students, including the cost of transporting these students for extra-curricular activities. Each magnet school was to have a student population of 50% black and 50% non-black. At the elementary level, each district agreed to allocate its seats in proportion to the racial ratio present in that district at that level. At the secondary level, each school district was to allocate its seats on the basis of 50% black and 50% non-black.

The seat allocations were not to be made to a particular school but only by school level, i.e., elementary, junior high and senior high. If there is an oversubscription to a magnet school by race, grade or school, each district could make a recommendation to the Magnet Review Committee for its approval of the actual distribution of seats. Each district was to establish an open enrollment policy for magnet schools and was to be permitted to determine how children would be selected for magnet seats allocated to each district. Importantly, particularly for the purpose of this appeal, the agreement provided:

> In the event there are unused seats by any district then persons on waiting lists to attend from the other

districts shall be permitted to attend before any seat is left vacant.[21]

Finally, it was agreed that the daily administration and operation of the magnet schools would be the responsibility of the host district.

The District Court approved the stipulation, *Little Rock*, 659 F. Supp. at 363, and the magnet school plan went into effect at the beginning of the 1987-88 school year. As might be expected, problems relating to enrollment arose. Most importantly, for the purposes of this appeal:

1. Neither PCSSD nor NLRSD were able to meet their enrollment goals. Thus, some of the seats allocated to those districts were unused.

2. Fewer white students than allocated enrolled in the magnet schools from PCSSD and NLRSD.

In July of 1987, the Little Rock School Board met and determined that, if LRSD admitted all of the white Little Rock students on the waiting list (as the agreement required it to do), several of the non-magnet schools in the school district would more than likely become racially identifiable. It also believed that if the vacant seats, particularly at the elementary level, were filled by Little Rock students, the magnets would lose their interdistrict character and would be perceived as LRSD magnets. It finally reasoned that if LRSD accepted more than its as-

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[21]Any district which did not provide a student to fill an allocated seat not occupied by another student would be required to pay to the host district as its full liability for the unfilled seat the per pupil cost of the host district's debt service payment, both principal and interest, for the construction and renovation of the schools in the magnet program.

signed quota of students, some students from other districts would be blocked for a number of years from enrolling in the magnets, because the plan contemplated that, once a student enrolled in a magnet school, he or she would be permitted to complete his or her education in that school.

At this point, NLRSD moved the District Court to enter an order finding LRSD in civil contempt for failure to abide by the District Court order approving the stipulation. NLRSD stated that vacancies existed and LRSD was not living up to its obligation to accept students on the waiting list and that NLRSD would incur substantial financial obligations if the vacancies were not filled. The District Court ordered an immediate hearing. At that hearing, NLRSD introduced evidence to support its view that LRSD had refused to admit students on the waiting list and that LRSD should be held in contempt for this refusal.[22]

LRSD, on the other hand, called several members of its Board, who repeated the concerns previously expressed at Board meetings. Each Board member testified that the Board did not intend to ignore or violate the terms of the stipulation, but, rather, intended to take the matter to the Magnet Review Committee and ask that committee to

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[22]NLRSD had subpoenaed white parents who lived in the LRSD who wanted to enroll their children in one of the magnet schools and who had been denied that opportunity at least by the date of the hearing. Each of the white parents that testified made it abundantly clear that they considered the magnet schools to be superior to the schools to which their children had been assigned, and some of the witnesses testified that they considered any school with an overwhelming black population to be inherently unequal. They stated that, unless their children could attend magnet schools, they would send them to private schools.

address their concerns and then to bring the problem to the District Court for final resolution.

After extensive hearings, the District Court, in an order dated August 7, 1987, held:

> From the May 22 hearing to this day, LRSD has yet to ask that this court modify these orders. Assuming LRSD plans to file a motion to modify the orders pursuant to Rule 60(b), that Rule clearly states that orders remain in effect until modified. This court cannot and will not *sua sponte* modify these orders. The July 15 release date had already passed two weeks prior to the board's July 30 vote to seek modification. Consequently, the LRSD is technically in civil contempt of these court orders. Rather than energetically and diligently complying with the orders, the LRSD voted to ask for modification after the first release of seats was a *fait accompli*. I do not find the failure to be intentional or willful on the part of any board member. However, as explained, *supra*, intent is irrelevant to the issue of civil contempt.
>
> Although the LRSD is technically in contempt, I find it inappropriate to tax costs or attorneys fees. I am confident that LRSD will immediately move to comply. However, the LRSD Board, the LRSD administration and its attorneys are put on notice that I will regard as extremely serious, subject to severe sanctions, any further delay in the implementation of the orders previously issued in this case with regard to magnet schools. In accordance with Orders previously in effect, eighty per cent (80%) of the unfilled PCSSD and NLRSD magnet seats shall be filled by LRSD applicants in such proportion as to result in a 50-50 black to white ratio. Since the opening of school is less than a month away, the parents of the affected children shall be *immediately* notified of the assignments.

LRSD appeals from the order finding it in civil contempt and asks this Court to address the concerns that it raised before the District Court.

B. DISTRICT COURT'S CONTEMPT ORDER

We agree with the District Court that the LRSD should have gone before the District Court and asked for modification of the agreement before deciding to ignore or violate the order, even if only for a short period of time. The finding of civil contempt is affirmed. We also agree with the District Court that the violation was a technical one. We, therefore, hold that the District Court did not abuse its discretion in failing to tax costs and attorneys fees to LRSD.

C. LRSD'S CONCERNS WITH RESPECT TO MAGNET SCHOOLS

Having said this, we believe it necessary for this Court to address the concerns that have been raised by LRSD, because they are real concerns that must be resolved by the school districts, the Magnet Review Committee, and, if necessary, the District Court. Initially, we restate our view that the magnet school population should be interdistrict in nature and racially balanced. In this respect, we do not disagree with the District Court's order that individual schools can be 55% black without violating this Court's en banc decision. To maintain the interdistrict nature of the program: the magnet schools must be recognized throughout the county as truly high quality schools, with excellent teaching staffs and unique programs of interest to suburban and city students alike; a vigorous program of recruitment must be maintained throughout the

county; and applications for additional magnet programs in schools should be considered pursuant to the stipulation.

There remains the question of whether we should set aside the stipulation and court order insofar as they require a magnet school with vacancies to accept students from the host district on a waiting list. We will not set the order aside at this time, but we find merit in the argument advanced by LRSD that this requirement may, unless modified, defeat the interdistrict character of the magnets and make it very difficult to maintain the agreed-to racial balance. The Magnet Review Committee, the parties, and the District Court should give careful consideration to this problem.

D. THE JOSHUA INTERVENORS' CONCERNS

The Joshua Intervenors make two additional contentions with respect to the magnet schools. They argue that the $3100 per pupil cost figure established by the District Court as the maximum that can be spent for the current magnet school program should be set aside as arbitrary. We believe this to be unnecessary. The figure was agreed to by the three school districts and the State for a single year. All parties agree that in future years the Magnet Review Committee will determine the cost per pupil necessary for the magnet program and will, subject to the court's approval, use adjusted cost figures.

The Joshua Intervenors also argue that the decision of the District Court denying them membership on the Magnet Review Committee should be reversed. The District Court, however, was simply following the language of this Court's opinion, *see* 778 F.2d at 436, in refusing

them membership. We are now persuaded that the Joshua Intervenors should be permitted to designate a person to serve as a voting member on the Magnet Review Committee. As representatives of the class whose constitutional rights have been violated, they are entitled to representation, and we direct that the District Court, on remand, enter an order to that effect.

The Joshua Intervenors also question that portion of the decree that provides that no transfer of a student to a magnet school shall, by reason of its effect on the racial balance of a non-magnet transferor school, be taken to violate the provisions of the remedial decree or of the Constitution. We agree that this provision may have troublesome implications, and we direct the District Court, on motion of any party and after appropriate notice and hearing, to reexamine it carefully.

E. TEACHER ASSOCIATION CONCERNS WITH RESPECT TO ASSIGNMENT OF TEACHERS TO MAGNET SCHOOLS, BARGAINING AGREEMENTS, AND THE MAGNET SCHOOLS

On May 13, 1987, the District Court entered an order, 660 F.Supp. at 637, in which it stated that teacher assaginments to magnet schools shall be based on the desires of the individuals to teach in that magnet school and their competency to teach the given subject matter. It stated that transfers should be freely granted, that staffing should be made after consultation with the principal and the Magnet Review Committee, that any competent teacher desiring to remain at a magnet school shall be retained, and that the Magnet Review Committee should be con-

sulted on the staffing of all magnet schools. The District Court believed that such teachers were available within LRSD and PCSSD but authorized the hiring of additional teachers if they were not. 660 F. Supp. at 635.

On May 26, 1987, the District Court issued another order relating to the magnet schools which essentially repeated the principles stated in its first opinion on this subject, and went on to set forth in more detail the procedures to be followed in hiring teachers for the magnet schools. It added the criterion that each magnet school certified staff be not less than 25% black nor more than 50% black in the 1987-88 school year. Finally, on July 2, 1987, it entered the third order relating to the magnet schools and again reiterated the principles previously stated.

On appeal, the classroom teachers associations argue that the broad authority given to the Magnet Review Committee creates a district within a district and that the court order abrogates the rights of the classroom teachers under their collective bargaining agreements. We cannot agree. In our view, the District Court order outlining the duties and responsibilities of the Magnet Review Committee was well conceived.[23] It recognizes the interdistrict character

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[23]The District Court stated in its order of July 2:

> [T]he role of the MRC is to make recommended policy decisions regarding the operation of the magnet schools. Those decisions should then be communicated, in a written report, to the court for approval. The report should reflect the process used to reach decisions and should re-

(Continued on following page)

of the magnet school program and carefully allocates responsibilities between the Magnet Review Committee and the host district. We would add that our review of the record leaves us with the firm impression that the members of the Committee are well qualified and have acted in the best interests of all the students with little evidence of parochialism on their part. We specifically agree with the court's order with respect to the procedures to be followed in recruiting and hiring faculty for the magnet schools and the part that the Magnet Review Committee

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(Continued from previous page)

flect independent fact-finding. Objections to MRC reports should be filed with the court within 20 days, after which the court will approve, modify or reject the MRC's recommendations.

* * * * By way of example, in selecting staff, the MRC should set the criteria to be used or process by which teachers are selected for magnet schools; the host district would implement that policy by appropriately selecting the teachers.

With respect to seat allocation, the MRC should establish a policy for seat allocation within the bounds of the stipulation which will maximize participation in the magnet schools from all three districts. Each district should set its criteria for selection of its students for magnet schools to enhance its desegregation efforts. * * *

* * * *

The MRC must play an integral role in the budgeting process. For the 1987-88 school year the stipulated figure of $3100 per student will apply. In the future, the MRC should work with the host district in arriving at a recommended budget. That budget should then be submitted for court approval. In the event agreement cannot be reached, the MRC should submit its recommended budget to the court, as with other MRC reports, according to the procedure outlined above. Objections or recommended modifications may then be timely filed by any party.

is to play in staffing operation. We do, however, make it clear that the collective bargaining agreements between host school districts and the classroom teachers associations remain applicable to the extent that such agreements are not inconsistent with the responsibilities heretofore given to the Magnet Review Committee or with orders of the District Court with respect to the staffing of magnet schools.

VI. TEACHER ASSIGNMENTS IN LRSD

A. BACKGROUND

The Little Rock Classroom Teachers Association, the Pulaski Association of Classroom Teachers, and the North Little Rock Classroom Teachers Association represent the teachers of their respective school districts. Each of the associations has entered into a collective bargaining agreement with the school district whose employees each represents. These collective bargaining agreements deal with a broad range of issues, including salaries, fringe benefits, seniority, assignments and promotions. The associations contend on appeal that the District Court has entered a series of orders which impermissibly modify or abrogate the terms of the collective bargaining agreements currently in effect between the associations and the school districts.

A District Court exercises broad remedial authority in dismantling segregation. *See Swann*, 402 U.S. at 15. This power, however, is limited by the principle that "federal courts must take into account the interest of state and local authorities in managing their own affairs, consistent with the constitution." *Morrilton School District No. 32*

v. United States, 606 F.2d 222, 229 (8th Cir. 1979), *cert. denied*, 444 U.S. 1071, 100 S. Ct. 1015, 62 L.Ed.2d 753 (1980) (citing *Milliken II*, 433 U.S. at 280-81).

The remedial authority of the District Court empowers it to alter or, in the extreme case, abrogate a collective bargaining agreement which perpetuates segregation or impedes a desegregation plan. *Cf. Liddell v. Board of Education*, 822 F.2d 1446, 1458 (8th Cir. 1987) (court created entity has power to make certain teacher staffing decisions). The agreements between a school district and a teachers organization, however, must be permitted to stand if they do not adversely impinge on these constitutionally mandated remedies. *See Morrilton*, 606 F.2d at 229. Any modification or abrogation can only be made after an evidentiary hearing and upon a finding that the change is essential to the desegregation remedy. With these legal principles in mind, we turn to the specific issues raised by the teachers associations.

B. THE LRSD TEACHER ASSIGNMENT PLAN

During the fall and winter of 1986-87, the Little Rock Classroom Teachers Association (LRCTA) and LRSD negotiated a teacher reassignment policy. They entered an agreement on March 2, 1987, under which about 80% of the teachers were to be reassigned to achieve desegregation, to accommodate a partial grade structure reorganization, and to balance the teachers in each school with respect to age, sex, education, and experience. An appeals procedure was established for teachers who objected to being reassigned.

On March 20, 1987, the District Court sua sponte issued a letter order in which it stated that it had come to the court's attention that a massive reassignment of teachers was in progress. It directed LRSD not to engage in reassignments of that magnitude. Pursuant to that order, the agreement was modified so that only 50% of the teachers would be reassigned. The revised policy still called for the balancing of faculty at each school site, not only as to race but also as to age, sex, education and experience.

On April 15, 1987, the District Court directed LRSD to show cause why it should not be found to have violated the March 20th order. At a hearing on April 29, LRSD revealed that the LRSD Board had again changed its faculty assignment plan. Instead of having 50% of the faculty reassigned, LRSD planned to retain at least 80% of the faculty at each school. On May 26, the District Court explained its view that the old teacher assignment plan would dilute the importance of race in the school assignment process (a factor the court stated was of continuing importance in the desegregation process) and would make it difficult for parents to exercise an informed choice under LRSD's plan for student assignments. It stated that this new policy was very close to the remedial measure ordered on April 15, 1987. It then stated:

> To ensure that there is no further misunderstanding of this teacher assignment order, LRSD is to have in my hands by May 18, 1987, the name and race of every senior high and junior high teacher reassigned from his/her present school, the school to which the teacher is assigned and the reason for the reassignment.

660 F. Supp. at 643.

The District Court decreed that 80% of the staff were to be retained at junior and senior high schools, with the

exception of the magnet schools, and that steps must be taken to reassign as many teachers as necessary in those schools to bring each such school to the 80% retention level. It directed that requests for transfers by primary and intermediate school teachers be honored. *Id.* at 644.

With respect to schools annexed by LRSD from PCSSD, the PCSSD teachers who had been offered employment by LRSD were to be assigned to the annexed school where they had been teaching. (Special orders were issued with respect to the J. A. Fair School.) If the reassignment caused a retention rate of more than 80%, some staff could be involuntarily transferred on a seniority basis. *Id.*

LRCTA appeals the District Court orders. It initially recognizes that the District Court plan will be fully implemented before this Court can decide the issue and that a reversal of the District Court would result in disruption within the school district. It accepts the proposition that a collective bargaining agreement must yield when necessary to remedy a violation of federal civil rights. It urges this Court not to reverse the District Court order but to hold that the District Court erred by exceeding the scope of its remedial authority. It argues that with such a remedy, desegregation in the three school districts in Pulaski County can continue to move forward with the (sic) unnecessarily intrude (sic) upon their contractual rights with respect to educational policy.

We appreciate the fact that LRCTA does not ask this Court to reinstate the assignment policy agreed to by the association and LRSD. Such an act would unduly disrupt the education of the children. We hasten to add, however,

that the authority of a federal court to alter or modify collective bargaining contracts in school desegregation cases must be based on a finding that the alteration or modification is necessary to further the effort to integrate the schools in question. *See Morrilton*, 606 F.2d at 228-29. Here, unfortunately, no such findings preceded the issuance of the March and April orders, and the findings preceding the May order hardly justify the broad order issued by the District Court. As matters now stand, the present teacher assignment policy in the non-magnet schools in LRSD will remain in effect for the balance of the 1987-88 school year. The associations have given no indication that they intend to insist on the enforcement of the collective bargaining agreement for the 1988-89 school year and beyond. Nor have they indicated satisfaction with the extension of the current policy beyond the 1987-88 school year. Under these circumstances, we are not in a position to determine how a teacher assignment policy will affect desegregation. We simply state that if any of the school districts agree to a teacher assignment plan with an association, the District Court must conduct an evidentiary hearing and make careful findings before setting the agreement aside. And it should do so only if the agreement impedes, disrupts or interferes with the comprehensive plan to desegregate the schools of Pulaski County.[24]

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[24]On April 28, 1987, the District Court granted the motion of four teachers, Becky McKinney, Mary J. Gage, Janice Dent, and Joyce Pearson (the McKinney Intervenors) to intervene in this suit. The McKinney Intervenors reside in Pulaski County and teach in either LRSD or PCSSD; none belongs to any teachers association which has been a party to this suit since 1984. The McKinney Intervenors contended that the teacher associa-

(Continued on following page)

C. SENIORITY OF PCSSD TEACHERS

As a result of this Court's order realigning the boundaries between LRSD and PCSSD the latter school district found it necessary to lay off approximately 381 teachers in April, 1987. It did so in reverse order of their seniority.

Meanwhile, the teachers associations of LRSD and PCSSD entered into an agreement to arbitrate the question of seniority of teachers from the PCSSD to be employed by LRSD. The parties were unable to agree as to the framing of the precise issue and left this question to the arbitrator.

The District Court, upon learning of the decision to arbitrate the seniority question, entered an order on May 13, 1987, in which it held that the agreement transferred

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tions could not adequately represent their interests on the issue of teacher reassignments in LRSD.

The teacher associations appeal the District Court order allowing intervention. They argue that the District Court erred by not holding a hearing and by not making specific findings of fact before granting the McKinney Intervenors' motion to intervene. They also contend that the teacher associations adequately represent all teachers because all teachers were affected by the transfers and that any disagreement on this issue should have been considered at a hearing.

We agree that a hearing should have been held and the District Court should have made factual findings on this issue. *See United States v. Crucial*, 722 F.2d 1182, 1190 (5th Cir. 1983). However, it is not necessary to remand to the District Court for a hearing. The issue which concerns the McKinney Intervenors most—the March 2d Agreement—has been resolved in this appeal. With the resolution of that issue, the need for their intervention has come to an end. If the McKinney Intervenors should again believe that their interests are not being adequately represented by the Knight Intervenors, they can again move to intervene and the District Court can conduct a hearing, make factual findings, and decide the propriety of intervention at that time.

to an arbitrator an issue which was clearly embraced in its memorandum and which should be decided by it. The Court stated:

> The following policy on seniority shall apply to those teachers from PCSSD who will be employed to work in the LRSD beginning in the fall of 1987. After the second year of employment by LRSD, a staff member will obtain one-third of his/her seniority acquired in PCSSD, which will be added to the two years of employment in the LRSD. At the end of the fourth year of employment, another one-third of the seniority acquired in PCSSD will be obtained. At the end of the fifth year, the remaining years of seniority in PCSSD will be obtained. In summary, after five years of employment in LRSD, all the years of seniority in PCSSD will be added to the five years spent in LRSD and the sum of these two figures will represent that individual's seniority.

Little Rock, 660 F. Supp. at 645.

We are unable to find support in the record for the District Court's decision. The collective bargaining representatives of the PCSSD teachers and the LRSD teachers agreed to arbitrate. The sole issue before the arbitrator was to be the relative seniority of LRSD teachers and the newly hired PCSSD teachers. The record does not reveal that racial considerations should or would be a factor in the decision, just as it does not reveal why the decision of the District Court with respect to seniority either contributed, or failed to contribute, to the desegregation of the two school districts involved in the arbitration. The decision of whom to hire and where to initially assign the former these decisions in accordance with the Court's mandate and District Court orders.

On remand, then, the District Court's order of May 13th will be vacated insofar as it relates to the seniority issue, and the parties shall promptly proceed to arbitrate that issue, unless the parties can resolve the dispute through negotiation.

D. PCSSD RECALL OF TEACHERS

The teacher associations appeal from a July 8, 1987 decision of the District Court which permitted PCSSD to recall black teachers who had been laid off in larger numbers than white teachers as a result of boundary realignments between LRSD and PCSSD.

The facts are accurately stated by the District Court. We summarize them here.

In an earlier decision, the District Court found PCSSD liable for a number of segregative acts, including the failure to meet black staff hiring goals ordered in *Zinnamon v. Board of Education of Pulaski County Special District*, No. LR-68-C-154 (E.D. Ark. 1973). We affirmed that decision in *Little Rock*, 778 F.2d at 420-21. PCSSD complied with those decisions in its present desegregation plan under which the percentage of black staff equals the percentage of black students. However, when PCSSD laid off the 381 teachers in April, 1987, due to the school district boundary realignment, black teachers were laid off in disproportionate numbers due to the recency of their hiring. PCSSD sought the District Court's permission to recall a larger number of black teachers on a basis other than seniority.

LRSD, the Joshua Intervenors, and the teachers associations opposed the PCSSD motion. LRSD objected on the grounds that if PCSSD were allowed to rehire affirm-

atively all its black teachers, LRSD would be forced to fill its vacancies from an all-white pool of laid off PCSSD teachers. The Joshua Intervenors urged the District Court to deny PCSSD's motion and suggested as an alternative that laid-off black teachers be hired in equal numbers by LRSD and PCSSD, thereby allowing each district to meet its hiring goals. The teachers associations objected to affirmative recall on the ground that such recall would violate the equal protection clause of the Fourteenth Amendment, as interpreted in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 106 S. Ct. 1842, 90 L.Ed.2d 260 (1986). The District Court held:

> The relevant question at this juncture is not whether affirmative recall of blacks is permissible in light of the PCSSD's correlation of minority students to staff, but rather whether affirmative recall of blacks is sufficiently narrow to remedy the disparate impact that court-induced layoffs had on black teachers in PCSSD. In a promotion case, the relevant labor market consists of the current employees; in a recall situation, the relevant labor pool consists of those teachers who have been laid off and are awaiting recall. It is not the percentage of qualified blacks in the labor market seeking employment since, by contract with its teacher union PCSSD must recall laid off teachers before hiring new personnel. The proper analysis, then is a comparison between the numbers of black teachers to white teachers before layoffs, and the numbers of black teachers to white teachers after the layoffs.
>
> After applying the criteria set out in [*U.S. v. Paradise*, — U.S. —, 107 S. Ct. 1053, 94 L.Ed.2d 203 (1987)], to the current situation, I am convinced that permitting PCSSD to recall affirmatively its black staff members to the extent they were disproportionately laid off is not only justified, but necessary to prevent yet another tragic irony in this case, that is,

> that the desegregation orders of this court and the Court of Appeals would directly cause blacks to shoulder a disproportionate burden in job layoffs. Nothing short of this one-time affirmative recall can remedy that effect.

We agree with the District Court for the reasons given by it. We additionally note that all teachers who taught at PCSSD prior to the boundary line changes mandated by this Court and who have made application for employment have now been employed by either PCSSD or LRSD. Under these circumstances, we believe that the District Court's order was narrowly tailored to ensure that the previously mandated goals for a desegregated faculty have been met.

VII. ANNEXATION

The Joshua Intervenors appeal the District Court's approval of the annexations of five small parcels of land in PCSSD by NLRSD. We affirm the District Court.

Parents of thirty white students petitioned the PCSSD Board and the NLRSD Board for annexations of property in PCSSD to NLRSD pursuant to Arkansas Act 549 of 1987. The Act places a number of restrictions on annexations. Important to this appeal is a provision that the annexing district must contain a higher percentage of minority students than the district losing territory.[25] Each

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[25]In addition, the petitioners must own property located wholly within an incorporated town; the annexing school district must be within the town; the property to be annexed and the territory of the annexing school district must be contiguous; the property to be annexed cannot be larger than five thousandths of one percent of the total territory of the district losing the property; and the property must be residential.

Board held a hearing. The Joshua Intervenors raised no objections at either of the hearings.

On August 6, 1987, NLRSD filed a petition in federal District Court for approval of the annexations. The District Court approved them the same day without receiving responses by any other party and without a hearing. The Joshua Intervenors filed a motion for reconsideration, arguing that the District Court should only conditionally approve the annexations, subject to a reassignment of the thirty students, if needed, to achieve a constitutionally required level of desegregation. The District Court denied the motion on October 6, 1987.

We find that the District Court did not abuse its discretion in denying the motion. Clearly, the District Court would have to reject the applications had it been shown that to do otherwise would frustrate the implementation of a constitutionally mandated desegregation remedy. *See, e.g., Wright v. Council of the City of Emporia*, 407 U.S. 451, 460-61, 92 S. Ct. 2196, 33 L.Ed.2d 51 (1972); *Haney v. County Board of Education of Sevier County*, 410 F.2d 920, 924 (8th Cir. 1969). A hearing would generally be proper to resolve the question of the effect of the annexations. In this case, however, the Joshua Intervenors have not shown that the action under state law "frustrates the objection of [federal law] in some substantial way." *Edgar v. Mite Corp.*, 457 U.S. 624, 632, 102 S. Ct. 2629, 73 L.Ed.2d 269 (1982). Here, the number of students involved is minimal. For these reasons, we affirm the District Court.

VIII. CITIZENS' COMMITTEE

On April 15, 1987, the District Court created the "Citizens' Committee" to monitor and assist in the implementation of LRSD's desegregation plan. Shortly thereafter,

the Joshua Intervenors issued subpoenas in order to depose members of the Committee. On April 21, Hillary Clinton, counsel for the Committee, moved to quash the subpoenas on the basis that the depositions were improper because the Committee was judicially immune and because any evidence gathered would be inadmissible.

After ordering the subpoenas quashed, the District Court issued an order explaining the purposes of the Citizens' Committee. Those purposes included gathering comments from the community and information from the parties and monitoring the progress in the implementation of the plan. The court further directed the Committee to "assist the parties as well as the [c]ourt in resolving any problems that arise with respect to the plan." The District Court characterized the Committee as an "arm of the [c]ourt, not required to engage in formal discovery to obtain the information it needs."

The Joshua Intervenors dispute the propriety of forming such a Committee with the powers this one has and of appointing an attorney to assist it. They argue that this Committee does not serve the functions typically served by such committees—e.g., providing for minority input or expert advice.

There is not one formula for a well-conceived monitoring committee. This Committee has expertise in the areas of education, civil rights litigation, and computers, *Little Rock*, 660 F. Supp. at 645, and the record suggests that the Committee has functioned well. The District Court was well within its discretion to devise a committee for the purposes stated by the court.

The Joshua Intervenors also contend that the Citizens' Committee acts as an improper surrogate for the

District Court, allowing it to gather information and often to bypass the parties. We find no significant prob'em in the delegation of powers to the Committee. The District Court clearly intended that the parties would still have an opportunity to object to any information submitted to it, and thus far the parties have had such an opportunity.

Although the District Court refers to the Committee as an "arm of the court," this statement clearly does not and cannot mean that the Committee was to have the powers of the court. The primary concern of the District Court was to ensure the Committee's ability to gather information by not subjecting the Committee to formal discovery requirements. The creation of such a Committee was well within the court's discretion.[26] *See, e.g., Liddell v. Caldwell*, 546 F.2d 768, 774 (8th Cir. 1976) *cert. denied*, 433 U.S. 914, 97 S. Ct. 2987, 53 L.E.2d 1100 (1977); *Harrington v. Colquitt County Board of Ed.*, 446 F.2d 1011, 1012 (5th Cir. 1971) ("bi-racial monitoring committee to advise with the parties and with the District Court"); *Morgan v. McDonough*, 540 F.2d 527 (1st Cir. 1976), *cert. denied*, 429 U.S. 1042, 97 S. Ct. 743, 50 L.Ed.2d 755 (1977) (order placing South Boston High School in receivership).

IX. CONCLUSION

The mandate of this Court shall issue forthwith. The case is remanded to the District Court for action consistent with this opinion. To the extent that their positions have been adopted by this Court, the Joshua Intervenors and LRSD are prevailing parties on this appeal. They may

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[26]The appointment of counsel to the Committee was also proper. Clearly her function was not to act as a formal advocate but, rather, as a legal advisor.

file requests for an award of costs and attorneys' fees within the time allowed by 8th Cir. R. 17. Any other party which believes itself entitled to such an award may also file such a request. (Motions for fees previously filed need not be filed again.) Parties desiring to oppose any motion for fees and costs may file objections within 15 days after the filing of the motion.

It is so ordered.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX 1

Racial Composition of PCSSD Schools
Under the January and March Plans

I. North of River

A. Elementary Schools	School Year 1986-87	% Black Proposed under January Plan	% Black Proposed under March Plan
Adkins	40%	30%	35%
Arnold Drive	13%	20%	15%
Bayou Meto	3%	0%	1%
Cato	4%	21%	18%
Dupree	29%	20%	18%
Harris	45%	32%	31%
Jacksonville	26%	23%	27%
Oakbrooke	16%	22%	18%
Oak Grove	12%	20%	11%
Pine Forest	13%	22%	12%
Pinewood	26%	21%	23%
Scott	35%	38%	32%
Sherwood	23%	25%	20%
Sylvan Hills	16%	20%	21%
Taylor	27%	19%	23%
Tolleson	18%	19%	15%
B. Junior High			
Jacksonville North	29%	20%	21%
Jacksonville South	29%	20%	22%
Northwood	7%	20%	14%
Oak Grove*	——	21%	10%
Scott	36%	32%	29%
Sylvan Hills	16%	21%	16%
C. Senior High			
Jacksonville	28%	19%	21%
North Pulaski	8%	22%	15%
Oak Grove*	10%	20%	11%
Sylvan Hills	13%	18%	14%

II. Southeast Quadrant

A. Elementary Schools

College Station	73%	39%	56%
Cook	60%	39%	55%
Fuller	40%	39%	56%
Landmark	25%	40%	54%
New School	———	42%	56%

B. Junior High

Fuller	43%	34%	51%

	School Year 1986-87	% Black Proposed under January Plan	% Black Proposed under March Plan
C. Senior High			
Mills	39%	32%	%50

III. Southwest Quadrant

A. Elementary Schools

Baker	3%	33%	12%
Lawson	0%	32%	11%
Robinson	15%	36%	13%

B. Junior High

Robinson Middle	12%	22%	10%

C. Senior High

Robinson	12%	24%	10%

*Oak Grove is a combined junior and senior high school. For the present school year data detailed above, all students attending that school are counted as senior high school students.

Supreme Court, U.S.
FILED
JUN 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

87 - 2085
No. 87-

In the

Supreme Court of the United States

October Term, 1987

Arkansas State Board of Education, Jeff Starling, Earle Love, Robert L. Newton, L.D. Harris, Harry P. McDonald, Alice L. Preston, Elaine Scott, Walter Turnbow, and Nancy Wood,
Petitioners,

v.

Little Rock School District; Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Wayne Joshua; Rev. Robert Willingham; Sara Matthew as next friend of Khayyam Davis and Alexa Armstrong, Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr., and Brian Taylor; Rev. John M. Miles, as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of the NAACP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACP,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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LITTLE ROCK SCHOOL DISTRICT, Plaintiff,

v.

PULASKI COUNTY SPECIAL SCHOOL DISTRICT NO. 1; North Little Rock School District; Arkansas State Board of Education; Wayne Hartsfield; Walter Turnbow; Harry A. Haines; Jim Dupree; Dr. Harry P. McDonald; Robert L. Newton; Alice L. Preston; Jeff Starling; Earle Love; Bob Lyon; John Ward; Judy Wear; Leon Barnes; Marianna Gosser; Steve Morley; Mac Faulkner; Bob Moore; Don Hindman; Shirley Lowery; Sheryl Dunn; David Sain; Bob Stender; Grainger Williams; Richard A. Giddings; George A. McCrary; Buddy Raines; and Dale Ward, Defendants,

Katherine Knight, Individually and as President of The Little Rock Classroom Teachers Association (LRCTA); LRCA; Ed Bullington, Individually and as President of The Pulaski Association of Classroom Teachers (PACT); Pact; John Harrison, Individually and as President of The North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; and Milton Jackson, Individually and as a Non-Certified Educational Support Employee of the Little Rock School District, Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Wayne Joshua; Rev. Robert Willingham; Sara Matthews, as next friend of Khayyam Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson, as next friend of Tatia Hudson; Mrs. Hilton Taylor, as next friend of Parsha Taylor, Hilton Taylor, Jr. and Brian Taylor; Rev. John M. Miles, as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of the NAACP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of NAACP, Intervenors.

No. LR-C-82-866.

United States District Court,
E.D. Arkansas, W.D.

Feb. 27, 1987.

Order March 4, 1987.

INTERIM ORDER ENFORCING MANDATE OF COURT OF APPEALS

HENRY WOODS, District Judge.

In conformity with the opinion of the Court of Appeals dated November 7, 1985, 778 F.2d 404 (8th Cir.), and the ensuing mandate, a hearing was held on January 29-30, 1987, to consider the recommendation of the Magnet Review Committee concerning the locations, themes, dates, operation, transportation, seat allocations, targeted ratios, and administration of the magnet schools in this county. January 29th and 30th were devoted to testimony adduced by the Magnet Review Committee on behalf of its plan.

The hearing was adjourned to continue the week of February 17, 1987 a presentation of the magnet school plans of the other parties and a critique of the plan of the Magnet Review Committee. At the close of the testimony on January 30, I suggested that the parties again confer and attempt to reach an agreement on the magnet school portion of the Eighth Circuit mandate. (R. 568-69)

On February 17, 1987, the hearing was resumed to take up not only the magnet school issues but also the student assignment plans submitted by the Pulaski County Special School District (hereafter PCSD), (sic) the North Little Rock School District (hereafter NLRSD), and the Little Rock School District (hereafter LRSD). The three districts

and the State Department of Education then advised the court that they had agreed by stipulation to a magnet school plan for the County which had been submitted to the Magnet Review Committee and approved by the latter. (R. 577). In open court the Joshua intervenors advised that they had no objections to the stipulation and were in general agreement with its terms. Since the Knight intervenors had not been party to the negotiations leading to the stipulation, they declined to approve the plan but interposed no objection thereto. I have examined the stipulation in detail. In my opinion it is an excellent compromise of the many complex issues involved in magnet schools. The stipulated settlement is in all respects approved. A copy of the stipulation is attached hereto as Exhibit A and is incorporated by reference in this order.

All of the parties except the Joshua and Knight intervenors have also stated in open court that the provisions of the Magnet Review Committee Report dated January 22, 1987 (MRC) not superseded by Exhibit A were stipulated as binding on the three districts and the State Board of Education. (R. 582-21). The Magnet Review Committee Report is attached hereto as Exhibit B. The stipulation and agreement as aforesaid are approved in all respects.

On behalf of all the parties, the attorney for the Little Rock District dictated into the record some minor supplemental understandings in connection with Exhibit A. (R. 577) These understandings have been reduced to letter form and have been marked as Exhibit C to this order and are incorporated herein by reference. These understandings are approved as supplemental to Exhibit A.

One issue remains with reference to the magnet schools presently in existence. That is the question of whether the students presently at the three magnet schools should remain and finish at the schools which they have been attending. Based on the evidence presented, I am

convinced that the past success of these schools is the best argument for continuing the present student body as much as possible. Involved parents, black and white, of children attending these schools have contributed greatly to their success and have invested a huge amount of time and energy in making these schools outstanding. It would be a mistake in my opinion to dump these students and start anew. There will of course be attrition and new seats available through graduation, but the students presently enrolled in Booker, Mann and Williams shall have a right to continue in these schools.

The responsibilities of the Magnet Review Committee, as agreed by the three districts and the State Board of Education, appear at pages 1 and 2 of Exhibit B hereto. The Committee shall be financed as agreed by the parties with a budget of One Hundred Fifty Thousand Dollars ($150,000) with Seventh-Five Thousand Dollars ($75,000) or half to be paid by the State and Twenty-Five Thousand Dollars ($25,000) by each of the three districts.

The MRC will necessarily work closely with the three districts and the State in order to have the six magnet schools ready for the 1987-88 school year. The MRC should report to the court on May 1, 1987, on July 1, 1987 and again on September 1, 1987 to inform the court of progress made in implementing the magnet schools. While the reports need not be lengthy, so as to be burdensome to the MRC, certainly the MRC reports should keep the court abreast of the status of critical aspects of implementation of the magnets including: renovations, teacher recruitment, staff training and development, community input and involvement, and student recruitment.

The Joshua intervenors and the Knight intervenors have both asked for representation on the Magnet Review Committee by a voting membership. I am unable to comply with this request. The Court of Appeals set forth in clear and unequivocal terms the makeup of the Magnet Review

Committee. At the request of all the parties, I did give the Joshua intervenors a non-voting member of the Committee. This was a modification agreed upon by all the parties that did not affect the basic structure of the Magnet Review Committtee. The request of the Joshua intervenors and the Knight intervenors for a voting representation on the Magnet Review Committee is hereby denied.

The financing of the magnet school plan has been stipulated; it is approved as covered in the stipulation (Exhibit A) and in the opinion of the Court of Appeals. In addition to the financing relating to magnet schools and to majority-to-minority transferes, there is only one other reference to state financing in the Court of Appeals decision, *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 435 (8th Cir. 1985):

> If the four all-or nearly all-black elementary schools as conditionally allowed by this Court in *Clark v. Board of Education of Little Rock*, 705 F.2d 265 (8th Cir. 1983), are retained in LRSD, compensatory and remedial programs of the type that we required for the nonintegrated schools in St. Louis shall be put into effect for the four schools. *See Liddell v. State of Missouri*, 731 F2d [1924] at 1312-18 [8th Cir. 1984]. The additional cost of these programs shall be paid for by the State of Arkansas.

Since there are no all-black schools in the LRSD student assignment plan, the conditions are not present which would trigger state financing of compensatory education, as is obvious from the above language. The Little Rock District has requested other funding from the State. None of the funding is required by the Court of Appeals ruling. The State's share of the magnet school funding will be considerable. It will strain the already meager resources of the State at a time when the State has committed itself to new standards for all Arkansas public schools. Although the blacks in Little Rock have suffered from the ravages of segregation, so have the blacks in every section and every county of the State. Significantly the new

state standards provide for compensatory education for all students where performance is sub-standard. (State Exhibit MX 25).

The parties have agreed upon a system for handling majority-to-minority transfers. The stipulation setting forth this agreement, attached hereto as Exhibit D, is approved and is incorporated herein by reference. The three districts and the Joshua intervenors have also agreed upon a Pulaski County Education Cooperative for staff development, distribution of audio visual resources, "teacher center" activities, purchasing and other cooperative efforts of mutual benefit. The stipulation establishing the cooperative venture, attached hereto as Exhibit E, is approved.

After carefully considering the student assignment plan submitted by the PCSD (sic), I have decided that it must be rejected for the reasons set forth in the record at pages 615-17. The district was given two weeks to submit an alternative plan. At the time the County's student assignment plan is considered, the court will deal with the other criticisms set forth by the Court of Appeals.

The broad outline of the student assignment plan submitted by the LRSD is hereby approved. Detailed assignments have been awaiting the resolution of the magnet school issues. The Little Rock District is hereby authorized to proceed with its student assignment plan as submitted to the court in March, 1986.

The North Little Rock School District was found to have purposefully committed a number of segregative acts, including the following which had an interdistrict effect: (a) failed to assign blacks to its central administration or to high school principalships and coaching positions; (b) concentrated whites in schools north of and blacks in schools south of Interstate 40; (c) assigned students to special education classifications on a discriminatory basis and (d) failed to apportion the burdens of transportation equally on black and

white students. *Little Rock School District v. Pulaski County*, 584 F.Supp. 328, 353 (E.D. Ark. 1984). These findings were affirmed by the Court of Apeals. *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 422 (8th Cir. 1985).

In March, 1986, the NLRSD submitted an implementation plan designed to remedy the interdistrict effects of its constitutional violations. (March plan). Subsequently, in October of 1986, the NLRSD submitted a supplement to its implementation plan (supplement plan) which addressed remediation of intradistrict impact of its prior segregative acts.

The NLRSD student assignment plan, the "Storm Plan," has been in effect for a number of years. When properly implemented, the Storm Plan provides for a constitutional student assignment system and for equitable busing burdens between blacks and whites. According to its March plan, all NLRSD schools are currently desegregated and deficiencies found by this court have been corrected. This evidence was uncontradicted at the June, 1986 hearing.

The NLRSD plan includes a detailed staff recruitment component which, if implemented, should result in substantial gains in the area of recruitment and promotion of blacks to positions where they are currently underrepresented. Supplementally the NLRSD has agreed to develop numerical goals and timetables for increasing the number of blacks to these positions. (Supplement plan 2.1).

Remediation of the unconstitutional over-representation of blacks in "special education" classes consumes most of the NLRSD's March implementation plan. As with the rest of its plan, if put into effect as proposed, the imbalance caused by the categorization of inordinate numbers of black students as "retarded" would be eliminated. NLRSD has suggested several important monitoring procedures to insure compliance. (Supplement plan, 3.1).

The NLRSD supplement plan also addresses remedies for intradistrict segregative acts. In the area of compensatory education for black children who continue to suffer the trickle-down effects of past segregation, the NLRSD plan proposes an early childhood program. The program includes a testing process so that educationally disadvantaged children, both black and white, can be identified and targeted for help at an early age. For the early grades, that help will be provided through teacher aides who will provide one-to-one tutoring, through supplementary reading instruction, and through implementation of the State Minimum Performance Tests. Reading remediation will also be provided at the junior high school level, as will computer assisted instruction in basic skills with individualized programs.

The NLRSD supplement plan includes a number of programs aimed at the problem of students who leave school prematurely or "drop out." The excessively high dropout rate of blacks in the NLRSD is one of the most pressing problems for the blacks in that district. Proposed programs such as the WIN (We Intervene Now) and SAC (Student Assignment Class—which serves students who are suspended from their regular classes) are sound and should prove beneficial.

The violation relating to the disproportionate numbers of black students who are suspended or expelled for disciplinary reasons has largely been eliminated. For example, in the 1985-86 school year, 48% of the suspended students were black. While this percentage is somewhat higher than the actual percentage of black students enrolled (40%), the deviation is not so great as to indicate a continuing problem at this time. Expulsions are now infrequent (only 20 over the last three years) and are now made only by the board of education, after a hearing.

The NLRSD has made strides in improving the participation of black students in its Gifted and Talented

program. The NLRSD supplement plan includes a number of safeguards to insure identification of black children who are gifted/talented but culturally disadvantaged. In addition to the screening tests which recognize cultural differences (i.e. System of Multicultural Pluralistic Assessment), the NLRSD now uses an identification process which involves nominations and recommendations based on multiple criteria from a number of people. The ultimate placement of a child in the program is a group decision. (Supplement plan 8.1-8.4).

In sum, the NLRSD has made great progress in each area where it was found to have been deficient. The NLRSD's March 1986 plan, as supplemented in October 1986, reflects a solid and workable approach, if implemented, to end segregation in that school district. The NLRSD plan is hereby approved in all respects.

ORDER

[5] The Pulaski County Special School District (PCSSD) was found purposefully to have committed a number of segregative acts with an interdistrict effect: (a) failed to comply with a 1968 desegregation court order (*Zinnamon v. Board of Education of the Pulaski County Arkansas Special School District*, No. LR-CR-C-154); (b) constructed schools in locations which ensured that they would become racially identifiable; (c) failed to allocate the burden of busing equitably between black and white students; (d) failed to hire and promote black teachers and staff; (e) refused to allow deannexation to or consolidation with the North Little Rock School District (NLRSD) and the Little Rock School District (LRSD); (f) failed to assign students to schools in such a way as to maximize desegregation; (g) assigned students to special education classifications and gifted programs on a discriminatory basis; (h) assigned black principals to schools with high black enrollments; (i) created and maintained a racial imbalance in almost half its schools; (j) closed and downgraded schools in black neighborhoods

and failed to build new schools there. *Little Rock School District v. Pulaski Co. Special School District*, 584 F.Supp. 328, 353 (E.D. Ark. 1984). These findings were affirmed by the Court of Appeals. *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 418 (8th Cir. 1985).

Many of the violations have already been cured—either by court order or by affirmative actions of the PCSSD. The deannexation/consolidation violation has been cured by the redrawing of boundary lines which separate the districts. The failure to comply with *Zinnamon* includes the failure to appoint black members to the PCSSD board. By order of this court dated December 1, 1986, the PCSSD will now elect board members from zones. According to the plan submitted and approved, one of the zones will be majority black and another will be 40% black, 58% white and 2% other. This remedy supercedes that portion of *Zinnamon* dealing with black school board members. The ceding of the Granite Mountain area from LRSD to PCSSD includes the transfer of public housing areas to PCSSD. Moreover, there are apparently other public housing developments in the PCSSD. PCSSD Exhibits 18 and 20 in June, 1986, hearing. PCSSD has created a new position in the superintendent's office, the Coordinator of Housing and Integration. This staff person will, among other duties, relate to realtors, developers and planning agencies. PCSSD Exhibit R-2, p. 4. The PCSSD student assignment plan will soon be submitted and at that time the issues of desegregation in student assignments andequitable allocation of busing burdens will be addressed.

School site selection involves two separate violations. First, the construction of new schools where they are likely to be racially identifiable and second, the closing or downgrading of schools closest to centers of black population. Since this lawsuit was filed, the PCSSD board has adopted a policy making desegregation and equal access

to school primary goals in decisions to build, renovate, or discontinue use of a school. PCSSD Implementation Plan, March 1986 (hereafter PCSSD Plan) Appendix B. The Coordinator of Housing and Integration obviously should have input into sites for proposed new construction. While no schools have been constructed during the pendency of this case, two new elementary schools are now proposed. The sites chosen conform to the board's new policy and are approved. In that same vein, progress has been made recently in improving the physical plants in schools such as Harris and Scott which were racially identifiably black.

The PCSSD has made continuous progress in hiring and promoting black faculty. An affirmative action plan was adopted by the PCSSD board in 1984, which has apparently been successful. As of November, 1985, 22.6% of the PCSSD teachers were black as compared with a 23.6% black student population. PCSSD Plan Appendix I. Further, the district has a goal to have black teachers make up 20-30% of the faculty in each school in the district. PCSSD Plan, Appendix I.

Similarly, the affirmative action plan for administrative staff appears to have been successful, although there remains underrepresentation in two specific categories: coordinators and directors. In spite of these specific areas which should be carefully monitored, the percentage of black administrators (24.7%) is good and indicates a positive step toward curing this deficiency.

The overrepresentation of blacks in special education classes can perhaps best be remedied through the use of culturally unbiased screening and subsequent monitoring. The PCSSD plan includes both of these elements. The result of the plan has been a marked drop in the percentage of blacks classified as requiring special education. PCSSD Plan, Appendix G. While the percentage of blacks designated for special education is 4.2% higher than the percentage of white children so designated, that deviation is within an acceptable range.

The PCSSD plan includes a commitment to assure black student participation in extracurricular activities. Notably, in the 1985-86 school year, black students comprised 28% of the membership in extracurricular activities. PCSSD plan, Appendix G. An affirmative recruitment plan will be implemented to remedy under-representation in activities where it occurs. PCSSD Plan, Appendix H.

The foregoing proposals of the PCSSD desegregation plan represent not only a turn in the right direction, but also significant progress toward achieving a unitary school district. While much remains to be done, much has been accomplished. Accordingly, this portion of the PCSSD desegregation plan is hereby approved.

EXHIBIT A

STIPULATION FOR RECOMMENDATIONS
REGARDING MAGNET SCHOOLS

The undersigned parties have agreed to make the following described recommendation to the Magnet Review Committee for its consideration in formulating its recommendation regarding magnet schools.

LOCATIONS AND THEMES

The parties have agreed to recommend the following magnet school locations and programs:

School & Program	Grade	Target Enrollment
Carver – Basic Skills Math-Science	K-6	475
Williams – Basic Skills	K-6	530
Booker – Arts	K-6	720
Gibbs – Foreign Language/ International Studies	K-6	348
Mann – Math-Sciences/Arts	7-9	975
Parkview – Arts-Performing Arts	10-12	1150
Total		4198

The curriculum at magnet schools will emphasize the magnet theme and all magnet students must fully participate in magnet courses. As well as the magnet theme, all magnet schools will have strong academically-oriented curricula.

New magnets or expansion of magnets already existing may be provided for in subsequent school years beginning 1988-89 under the provisions of the Order of September 3, 1986. Any party may present applications for a magnet

school or program not later than the beginning of each school year preceeding the proposed year of implementation. The Committee's decision and recommendation shall be submitted to the parties no later than November 15. The MRC shall make its recommendation to the Court not later than December 15.

IMPLEMENTATION

The parties propose that the District Court order the implementation of the six (6) aforementioned magnet schools for the 1987-1988 school year. The host district shall provide to the MRC and to the parties its implementation timetable at the time a magnet proposal is submitted to the Court.

FINANCING

The parties agree to the financing formulas proposed by the Magnet Review Committee at the hearing held on January 29 and 30, 1987. These formulas require the State to pay one-half (½) of the actual costs of the construction or renovation of magnet schools as well as the customary state aid and one-half (½) the cost of educating the magnet seat, and said seat is not occupied by any other student, will be required to pay to the host district as its full liability for said unfilled seat the per child cost of the host district's debt service payment, both principal and interest, for the construction or renovation of the schools in the magnet program. The host district will provide separate accounting and budgeting information regarding the magnet program to the Magnet Review Committee for review.

INTERDISTRICT TRANSPORTATION PLAN

The State Board of Education remains committed to underwriting the entire actual cost of transporting magnet and M-to-M transfer students, which includes the cost of

transporting these students for extra-curricular activities. The districts agree that transportation of magnet/M-to-M students should be performed utilizing measures which are most cost efficient. The interdistrict transportation plan shall not be used as a means to seek compensation for additional transportation vehicles unless such vehicles are directly necessary because of the interdistrict transportation plan. New full-sized school buses purchased in order to transport magnet/M-to-M students will be added to the total transportation fleet costs and applied on a pro rata basis to the transportation of magnet/M-to-M students. The cost of any other vehicles purchased to transport isolated magnet/M-to-M students will be prorated according to their actual use in transporting magnet/M-to-M students. Each district agrees to separately account for the costs of transporting magnet/M-to-M students and to make those records fully available to representatives of the State Department of Education at any reasonable time.

The parties agree that the Interdistrict Transportation Plan for both magnet schools and M-to-M transfers will be administered by an Interdistrict Transportation Authority (ITA). The ITA shall be composed of the Transportation Director or other designee of each district and a representative of the State. The parties agree that any conflict may be determined by a U.S. Magistrate acting as a Special Master for the District Court.

SEAT ALLOCATION

All magnet schools shall have a student population which is fifty percent (50%) black and fifty percent (50%) non-black. The parties agree that for the 1987-88 school year the magnet school seats shall be allocated according to the following formula: Twenty-five per centum (25%) of the capacity of a magnet school shall be reserved for the shadow area in the host district. The remaining seventy-five per centum (75%) of the seats shall be allocated to each of the three districts in proportion to that district's percentage of

county-wide students at each school level (elementary, junior high, or senior high). At the elementary level each district shall allocate its seats in proportion to the racial ratio present in such district at the elementary level. At the secondary level, each district shall allocate all its seats on the basis of 50% black, 50% non-black. However, the total number of seats assigned to the North Little Rock School District shall not exceed 475 seats with no more than 100 seats being allocated to the North Little Rock School District from Parkview.

It is understood that seat allocations will not be made by district to a particular school, but only by elementary, junior high and senior high level. Therefore, a particular district will be permitted to use its allocated seats in accordance with the desires of its students subject to space limitations in particular magnet schools and the maintenance of a 50-50 racial balance. If there is oversubscription among the districts by race, grade or school each district may make a recommendation to the MRC for its approval regarding actual distribution of seats. The three districts agree that each district will establish an open enrollment policy for magnet schools and will be permitted to determine how children will be selected for the magnet seats allocated to each district pursuant to that policy. This provision shall not prohibit the establishment of geographic preference areas where appropriate.

In the event there are unused seats by any district then persons on waiting lists to attend from the other districts shall be permitted to attend before any seat is left vacant. No student attending a magnet school will be considered as an M-to-M transfer student for incentive payment purposes.

TARGETED RATIOS

The parties have previously submitted to the Court a proposed stipulation for M-to-M transfers which in part

recognizes that if M-to-M transfers occur, ratios targeted by any of the districts for particular schools might be affected depending upon the locations from which M-to-M transfers occur. The parties in that stipulation agreed that the first priority should be a successful M-to-M transfer program and that if it did affect targeted ratios, such departures would not be regarded or urged as constitutional violations or departures from desegregation plans. The parties further recognize that a successful operation of the magnet school program could potentially have the same or similar effects upon targeted ratios. The parties therefore recommend that any magnet transfers not be counted as a departure from a desegregation plan or urged as a constitutional violation.

LITTLE ROCK MAGNET GRANT

The parties agree and recommend that, should the Little Rock District now or in the future prove successful in obtaining grants for the operation of magnet schools, any such monies shall be applied off the top to the obligations of all parties. The parties further agree and recommend to the Court that they cooperate in the development of an application for any future magnet grants.

ADMINISTRATION

The daily administration and operation of the magnet schools shall be the responsibility of the host district. The host district shall designate a person who shall have principal responsibility for overseeing the development and implementation of its magnet program.

STUDENT RECRUITMENT

The parties agree that the Magnet Review Committee shall establish a Magnet/M-to-M Educational Team (MET). The major responsibilities of the MET shall include community education and information dissemination of

educational opportunities in the magnet programs and recruitment for both magnets and M to M transfers. It shall report to the MRC. The MET shall be composed of the person from each school district and the State responsible for desegregation planning, and two additional persons selected by each of the following parties:

Joshua Intervenors

Little Rock School District

North Little Rock School District

Pulaski County Special School District

State of Arkansas

These additional representatives of the MET shall not be employees or officials of any of the districts or the State.

February 16, 1987

PCSSD Administrative Offices

The Magnet Review Committee (MRC) endorses the foregoing stipulations.

Pulaski County Special School District

/s/ Gene Jones

North Little Rock School District

/s/ James R. Smith

Little Rock School District

/s/ Jesse L. Rancifer

Arkansas Department of Education

/s/ Marcia A. Harding

Arkansas Department of Education

/s/ Morris F. Holmes

EXHIBIT B

MAGNET REVIEW COMMITTEE
REPORT TO THE COURT

January 22, 1987

The Honorable Henry Woods
U.S. Federal District Court
Eastern District of Arkansas
P.O. Box 3683
Little Rock, Arkansas 72203

Dear Judge Woods:

The Magnet Review Committee submits for your consideration the attached report including nine separate recommendations concerning magnet schools in Pulaski County.

The committee is prepared to present the report orally with supporting information as you may direct.

Sincerely,

/s/ Gene Jones
Gene Jones, Chairman
Pulaski County Special School
District

/s/ Morris F. Holmes
Morris Holmes
Arkansas Department of Education

/s/ Marcia A. Harding
Marcia Harding
Arkansas Department of Education

(See Attached Minority Report)

/s/ Jesse Rancifer
Jesse Rancifer
Little Rock School District

/s/ James R. Smith
James Smith
North Little Rock School District

I. INTRODUCTION

The Magnet Review Committee (MRC) has been charged by the District Court with "planning an interdistrict magnet school program." The MRC's duties and responsibilities set forth in the Court's order include:

- considering plans and proposals for magnet schools submitted by the parties and hearing evidence in relation thereto;

- developing interim proposals for consideration by the parties;

- evaluating segregative and desegregative effects of magnet school proposals;

- making findings and recommendations to the court concerning the number, location, staffing, racial ratios, and themes of magnet schools;

- making recommendations as may be necessary to the efficient operation and administration of magnet schools;

- monitoring, evaluating and recommending changes in the actual operation of the magnet schools implemented; and

- making an annual report to the court pertaining to the approved interdistrict magnet school programs.

The court directed that this report with the MRC's recommendations be submitted on or before January 22, 1987. This document addresses that charge. The report is organized into the following major areas: I. Introduction; II. Activities of the Magnet Review Committee; and III. Recommendations.

II. ACTIVITIES OF THE MAGNET REVIEW COMMITEE (MRC)

Parties appointed representatives to the MRC as directed by the Court. Currently those serving on the MRC are:

Mr. Gene Jones (White), Chairman, Pulaski County Special School District

Dr. Reginald Avery, Ex-Officio (Black), Vice-Chairman, Joshua Intervenors

Ms. Marcia Harding (White), Arkansas Department of Education

Dr. Morris Holmes (Black), Arkansas Department of Education

Dr. Jesse Rancifer (Black), Little Rock School District

Mr. James Smith (White), North Little Rock School District

The MRC first met on September 24, 1986 and agreed to meet weekly at sites to be determined at each meeting. The Committee also agreed to and held additional meetings as they became necessary. At the September 24 meeting, the MRC organized itself into a working group and began developing the rules and procedures that would govern its mission.

Under the rules and procedures developed by the Committee, the following activities were conducted:

- The MRC considered all plans and proposals that were submitted for magnet schools by the parties represented on the Committee.

- The MRC heard evidence and considered the views presented by the parties represented on the Committee.

- The MRC evaluated both the segregative and desegregative effects of all proposals for magnet schools.

- The MRC reviewed demographic data on each district.

- The MRC secured consultative assistance from Dr. Bennat Mullen, Director of the Technical Assistance of the Southwest.

- The MRC visited the Williams Magnet School, the Mann Science Magnet School, and the Booker Arts Magnet School, all located in the Little Rock School District. At each school, a discussion of the school's philosophy, goals and objectives was conducted with the principal and various staff.

- The MRC reviewed considerable research and information on magnet schools and added to this knowledge by visiting magnet schools in Cincinnati, Ohio, and St. Louis, Missouri. Both visits provided valuable insight on the operation of magnet schools.

The Arkansas Department of Education has exercised a positive leadership role in all activities of the Magnet Review Committee. ADE Director Tommy Venters and his staff developed thoughtful proposals which had a major impact on the Committee's recommendation. Additionally, The Department allowed Dr. Angelo Coppola to work full time for the Committee doing valuable research and data gathering.

III. RECOMMENDATIONS

A. *Magnet Review Committee Organization*

1. General Organization

Membership and general responsibilities have been outlined for the MRC in the District Court order. The MRC believes this order sufficient to address the membership issue and recommends that each party retain discretion in appointing its representatives on the MRC. The MRC has proven itself capable of handling the additional organizational aspects of the Committee's work and will continue to do so in the future.

2. Staffing and Funding

Efficient and effective operation of the Magnet Review Committee is critical to the success of desegregating the public schools of Pulaski County, Arkansas. In order to function effectively, the MRC recommends it have a staff consisting of at least two staff members—one professional and one support. In addition to a staff, the Magnet Review Committee requires an operating budget consisting of funds for an office, equipment, travel, staff and consultative services. Consultative services will be critical to data gathering, program monitoring, evaluation and preparation of annual reports to the Court. A budget within a range of $100,000 to $150,000 will be needed, with 50 percent of the

cost being borne by the State and the remaining 50 percent being shared by the three school districts.

B. *Costs and Funding*

1. Accounting and Budgeting:

The Magnet Review Committee recommends that separate accounting and budgeting procedures for approved magnet programs be maintained by the district(s) hosting each of the programs and that magnet program budgets receive prior review by the Magnet Review Committee.

2. Construction/Renovations:

In accordance with the Eighth Circuit order the State shall pay 50 percent of construction and renovation of approved magnet schools. The remaining 50 percent shall be paid by the participating districts (See Attachment A, pg. 26).

The recommendations on actual allocation and payments are as follows. The State shall pay its 50 percent allocation in quarterly payments upon actual expenditures for renovation and remodeling of approved magnet schools. The host school shall be responsible for the bond issue and payment of the remaining 50 percent since the ownership and management shall stay with that host school. The two remaining districts shall pay their prorated share by the inclusion of debt service payment, both principal and interest, in figuring the cost per child for those children participating from their respective districts.

In the event that allocated seats are not filled by any district, the district to which that seat was allocated shall pay the host school the per child cost of their debt service payment, both principal and interest.

Since the State would have met its obligation up front there will be no debt service payment of principal and interest figured into the State's 50 percent cost per child for operation of magnet schools.

It is recommended that the State be a full partner in all phases of construction and renovation, from selection of the architect to final approval.

3. Operating Costs:

The Magnet Review Committee recommends funding the operating costs for the approved interdistrict magnet programs as outlined in Attachment B, pgs. 27-32. The figures used for examples were determined using 1986-87 school year data. This data will change with the change in local wealth, increase or decrease in WADM, and increase or decrease in State funding.

In compliance with the Eighth Circuit order, the State will pay to each district the table rate that each respective district qualifies for that school year. In addition to the table rate (Customary State Aid) per District, the state will pay 50 percent of the cost per student for operation of the magnet schools less the transportation cost and debt service cost. As a result, those students attending magnet schools will not be counted in any District's WADM for aid.

C. *Interdistrict Magnet Programs Staffing*

The men and women selected to staff each of the magnet programs are responsible and accountable for assuring parents and the community that quality exists in both the process and product of schooling. The staff's performance should evidence their beliefs that all children can learn, that the school makes a difference, and that a desegregated school environment has positive effects on the schooling and lives of students.

1. Staff Composition

The staff should be composed of appropriately certified and otherwise highly qualified educators. The MRC recommends that the staff represent a 50-50 ratio of Black to White administrators and teachers. If such a ratio is not possible to attain at the time the magnet programs open, a goal should be set to achieve the ratio within a reasonable time frame.

To help ensure interdistrict and community ownership and support, effort should be taken to attract administrators and teachers from the three school districts.

2. Staff Selection

The actual selection, hiring and evaluation of the magnet program staff is the responsibility of the district operating the magnet program. However, the MRC will assist with the development of criteria for staff selection, as well as monitor and evaluate magnet school program effects on student learning and desegregation.

D. *Community Participation*

The Magnet Review Committee advocates that the community should participate in planning and developing interdistrict magnet programs developed after the initial year of desegregation. We therefore recommend that a community-school partnership model be adopted by the districts in accomplishing the continuing work of the magnet schools. Such a model would include the following components:

1. Awareness Campaign

Awareness activities are necessary to:

a. Establish within the community and schools a sense of the need for a partnership;

b. stimulate interest in the community-school partnership; and

c. motivate involvement in such a partnership.

2. Public Education Campaign

The community must be provided with a base of information about educational equity and excellence in a desegregated environment and about the issues in this case. Such information should include, but not be limited to, the following:

a. History of desegregation efforts in this community

b. Impacts/effects of court rulings and desegregation plans

c. Explanation of how the community-school partnership works in planning and implementing desegregation

d. Orientation to issues related to educational equity

3. Needs Assessment

It is important to identify needs and decide upon priorities among them. Such a process should be utilized to ensure that citizens and educators have the opportunity to participate in quality education planning.

4. System for Processing Input

A system must exist for acting upon community input to planning. This is necessary to any sincere effort to establish and maintain community involvement and support for educational equity and excellence in a desegregated environment. The following process is an example of a system which encompasses this aim.

a. Any individual or group is encouraged to submit ideas to the district aimed at affecting educational equity including, but not necessarily limited to, ideas for magnet schools and specialty programs.

b. The district sorts and channels the ideas(s) [sic] to appropriate group(s) for consideration.

c. The designated group(s) does the following:

(1) Analyzes the ideas

(2) Makes a recommendation (develop, postpone, reject)

(3) Corresponds with the author regarding the decision

d. If the idea is supported, broader community comment is solicited to determine the public's reaction to the proposed idea. The method previously described to involve the community can be applied here.

e. If support is apparent, individuals are identified to more fully develop the concept into a proposal, which is then shared with the school board.

f. The district plans and holds public hearings on the proposal following a period of publicity to stimulate public interest.

g. The School Board considers the community reactions and recommendations in decisionmaking on the proposal.

h. If approved by the Board, the program is readied by the district staff, publicized as appropriate, and implemented.

i. As part of the evaluation of each program's effectiveness relative to educational equity and excellence in a desegregated environment, parent/community satisfaction should be assessed and considered before modifications are made.

With minimal modifications, a system of this type will work equally as well at the building level (for school-based management) as at the district-wide level.

Additionally, when a proposal is made for the establishment or modification of an approved magnet school program, steps would be included to provide for the proposal to be brought before the Magnet Review Committee for consideration and endorsement.

E. *Transportation*

In fulfilling its responsibility to provide, either directly or indirectly, the magnet program students with transportation, the MRC recommends that the State keep in mind two primary considerations, these being:

1. delivery of magnet school students to their designated schools in a safe, orderly and expedient manner; and

2. cost efficiency.

F. *Student Enrollment Guidelines*

1. Racial Ratios

The Magnet Review Committee recommends that a 50-50 Black to White ratio be used for magnet program enrollment.

2. Seat Allocation

The Committee further recommends reserving the first 25 percent of the seats in each magnet school for students in the host district who live in the shadow of the school.

The remaining 75 percent of the seats in magnet schools should be allocated to the three districts on the proportional formula based on the percentage of each race residing in the affected district. The formula will be revised to maintain the mandated 50-50 ratio.

3. Existing Magnet Programs

The Committee recommends that students presently attending existing magnet schools should be allowed to continue in those schools as appropriate, but that seats in incoming grades and seats vacated by attrition be allocated to North Little Rock School District and Pulaski County Special School District on the interdistrict formula described above.

G. *Interdistrict Magnet School Programs*

The MRC recommends that six schools in the Little Rock School District become approved magnets. This proposal incorporates the continuation of the three magnet schools currently in existence and suggests the addition of Carver, Dunbar, and Gibbs. A total of 3,722 students can be educated in the interdistrict magnet programs recommended.

In this section of the report, the MRC's rationale for the inclusion of each proposed school is discussed.

1) Williams Magnet School (K-6)

The Little Rock School District has recommended the continuation of Williams as a "basic skills" magnet school

for elementary students. As presently operated, Williams has continued to attract students since 1982. The waiting list of children whose parents would like to have them attend Williams now stands at 396, indicating much interest in the school and its program. We recommend the continuation of the Williams Magnet School. We also recommend that those characteristics which appear to have made the program a success be carefully studied prior to making any changes. The Magnet Review Committee, in conducting its monitoring and evaluation activities, will monitor practices such as ability grouping relative to possible segregative and desegregative effects.

2) Booker Arts Magnet (K-6)

Booker is also recommended for continuation as an elementary arts magnet. Because it appears to be a highly successful program, the MRC recommends its continuation. The $916,000 estimated by Little Rock for construction and renovation of Booker appears to be too high. We believe that the projects proposed for these funds could be done for less money. This issue is addressed in more detail in the section of the report which deals with construction and renovation costs.

3) Mann Junior High Arts and Sciences Magnet (7-9)

The Mann program has entered its fourth year with a science magnet program which is a "school within a school," serving approximately 300 students in grades 7-9. Making the entire school a junior high science magnet next year has been considered. However, its waiting list consists of only eight students, hardly enough, even when combined with students from Pulaski County and North Little Rock to fill the school with over 1,100 junior high students all eager to study the sciences.

The MRC recommends instead that Mann Junior High School become an "arts and sciences" magnet. To combine

these themes within one magnet school would accomplish several objectives. First, it would bring together junior high students with strong interests and/or aptitude in two major areas but who may not yet be either willing or ready to narrow their choices entirely to one field or the other. For elementary students interested in the arts, it would provide a natural extension for children now attending Booker, but it would also help to expand, rather than narrow, students' participation in other fields of knowledge. It would accommodate the present math/science program (300 students) as well as the number of students who presumably would have gone to East Side under another proposal. It would be far less expensive than renovating East Side. It has an auditorium with a seating capacity of 1,100 and a gymnasium which could be useful for various arts activities as well as science presentations and exhibits. It is closely located to Booker and the Arts Center, thus providing opportunities to both schools to utilize consultants, artists in residence, craftsmen, and performers. We support the continuation of Mann as a magnet school. However, we believe that students interested in both the arts and sciences could be accommodated there.

4) Carver Math and Science Magnet (K-6)

The Little Rock District contends that Carver should become a magnet school because it will be impossible to desegregate the school otherwise. It proposes to tear down the present structure and relocate it on other land somewhere in the neighborhood that has not yet been purchased. Carver is said to be improperly located on its present school site, and the playground particularly difficult to maintain because of neighborhood vandalism.

Little Rock has proposed that Carver become a "basic skills" school similar to Williams, though without the dress code and without ability grouping. The District views the

"basic skills" theme as one particularly likely to generate parent support. The MRC agreees that the basic skills theme is likely to generate support, but we also believe that a basic skills program which emphasizes mathematics and science would enhance this school. In recommending Carver as a magnet, the MRC advises caution in changing characteristics which appear to have made the other basic skills program a success.

We envision a science program at Carver which would not only enable youngsters to study the sciences through hands-on laboratory experiences but would also enable them to take part in such national competitions as *Invent America*, a program which encourages creativity and problem solving in the development of new inventions and the uses of technology. Carver could also host science fairs and exhibits for other students in the area, as well as throughout the State, and could serve as a model for other districts in Arkansas.

5) Dunbar International Education Complex (K-9)

In order to provide more magnet choices for parents and students at an affordable cost, the MRC recommends that Dunbar and Gibbs (which are located adjacent to each other) become a magnet school complex with an international studies and global cultures theme.

Gibbs would provide the elementary (K-6) program and Dunbar would provide the junior high (7-9) program. We believe this magnet program holds excellent promise for offering an educational program that truly prepares youngsters for life and work in the twenty-first century. Such preparation means, in large measure, preparing a populace who can understand, interact with, and appreciate people representing many different cultures. A school experience that provides opportunities for growth, development, and understanding in these areas will be crucial for our continued success in the world. We must

educate young people who can function effectively as the citizens our country must have in the "global village" in which we live.

Included in the K-9 curriculum at the Dunbar International Education Complex would be foreign languages, technology, multi-cultural studies, international relations, geography, government, and law. Students would be involved in cross-age grouping and multi-disciplinary studies and would have opportunities to learn within their own miniature "global village," consisting of the two campuses. They would learn about the operation of government through functioning in a "micro-society" which would require their full participation. Student exchange programs would be encouraged. Teachers would also be exchanged among schools to provide specialized educational opportunities for students of different ages. Satellite instruction would bring programs to the schools from throughout the country. School "walls" would be minimized as students participated in "community" activities intended to strengthen and enhance the culture of the school and community and their understanding and appreciation of individual differences among themselves. These schools would establish linkages with the UALR Visitor Center, the business community, UCA, and the city's international community. The Complex could host "Academic Olympics" for other schools throughout the State. It would serve as an educational model for other schools in the State, showing how schools could be structured in such a way as to prepare youngsters for effective and intelligent participation in local, national, and world communities.

Benefits to be derived from the Dunbar International Education Complex are as follows:

(a) A continuous program in grades K-9 would be provided with themes that would foster multi-cultural understanding, exploration of international studies and global cultures, and the study of languages.

(b) A program such as the one described for the Complex would serve as a model for providing students with an "internationally competitive" education.

(c) The cultural resources of the area (e.g., Quapaw Quarter, Dunbar Alumni Association, UALR International Visitor Center, Arts Center, etc.) would enrich the international studies program.

(d) Programs in these schools appear to have a good possibility of meeting the three objectives of magnet schools as stated by the Court, i.e., to provide quality education, serve as a tool for achieving integration, and attract white students back to the Little Rock School District.

(e) The Complex could host contests, exhibits, and cultural events for other students throughout the State and could serve as a model program for other districts.

Attachment C, page 33, visually displays the MRC's proposal for interdistrict magnet school programs.

H. *Governance*

The Magnet Review Committee recommends that the day-to-day operations of magnet schools be the responsibility of the host school district.

I. *Extended Day Care*

The Magnet Review Committee recommends that self-supporting extended day care services be available for students at each of the interdistrict magnet schools.

A substantial number of parents living in the metropolitan area drive long distances to work each day. The Committee believes that the availability of extended

day care services will substantially enhance the desegregative effects of the magnet schools.

The cost associated with the extended day care services shall not be included in the operating costs of the magnet schools.

ATTACHMENT A

FACILITIES REPORT
CONSTRUCTION/RENOVATION

Building	LRSD Estimate	State Building Services Report	Revised Estimate
Carver	$ 2,420,000	Deduct $350,000 for land purchase	
	$ 2,070,000	12% too much contingency ($248,400)	$1,821,600.00
Booker	$ 916,000	8% too much contingency ($73,280)	$ 842,720.00
Mann	$ 2,511,400	9% too much contingency ($226,026)	$2,285,374.00
Williams	None		
Dunbar	$ 1,220,000	20% too much contingency ($244,000)	$ 976,000.00
Gibbs	$ 605,800	5% too much contingency ($30,290)	$ 575,510.00
		TOTAL	$6,501,204.00
		STATE'S PORTION	$3,250,602.00

ATTACHMENT B

MFPA CALCULATIONS UNDER ACT 34

(SCHOOL FINANCE ACT)

RESOURCES:

1. Real property assessment times 19 mills (.019).

2. Personal property assessment (year before base year) times current revenue divided by base year revenue times 45 mills (.045).

3. Utility assessment (year before base year) times current revenue divided by base year revenue times 45 mills (.045).

4. Seventy-five (75) percent of miscellaneous revenue.

5. Masters' degree credit.

Calculations:

6. 1 + 2 + 3 + 4 – 5 = Resources

7. Resources divided by WADM = Resource Rate

8. State Base Equalization Rate minus Resource Rate = Table Rate

9. Table Rate times WADM = MFPA (Minimum Foundation Program Aid)

MAGNET SCHOOLS
BASE DATA

Magnet School Students Total		3,722
Little Rock (25% shadow)	931}	
plus 43% of 2791	1200}	2,131
Pulaski County – 40% of 2791		1,116
North Little Rock – 17% of 2791		475

TOTAL EXPENSE*

	BUDGET 86-87	ADM	EXP/ADM	+ 12%**
Little Rock	$49,510,543	19116	$2,590.01	$2,900.81
No. Little Rock	$24,633,000	9419	$2,615.25	
Pulaski County	$69,057,078	30015	$2,300.75	

State Base Equalization Rate = $1,687.02

Table Rates (State Aid per Student):

Little Rock	$ 635.86
North Little Rock	$ 986.04
Pulaski County	$1,136.17

* Does not include transportation costs

**12% has been added to the Little Rock expense per ADM for estimated increased operation costs for magnet schools within the Little Rock School District.

LITTLE ROCK

Magnet School Expense Per Student	$2,900.81
Expense for Regular Student	$2,590.01
Number of Magnet School Students	2131
State Aid per Student (Table Rate)	$ 635.86

The State will pay one half of the expense of the Magnet Schools plus the State Aid.

$2,900.81 divided by 2 = $1,450.41 State's share

$1,450.41 – $635.85 = $814.55 Cost per student for a Little Rock student.

$814.55 × 2,131 = $1,735,806 Little Rock's costs for magnet students.

Little Rock's expense for a regular student is $2,590.01.

$2,590.01 less $1,687.02 (State Base Equalization Rate) = $902.99 Expenditure per regular student.

$902.99 (available funds for each student) less $814.55 = $88.44 Excess funds per magnet student over and above Little Rock's cost.

$88.44 × 2131 = $188,466 Total incentive savings for Magnet participation

NORTH LITTLE ROCK

Magnet School Expense Per Student	$2,900.81
Expense for Regular Student (North Little Rock)	$2,615.25
State Aid Per Student (Table Rate)	$ 986.04
Number of Magnet School Students	475

The State will pay one half of the expense of the Magnet Schools plus the State Aid.

$2,900.81 divided by 2 = $1,450.41 State's share.

$1,450.41 – $986.04 = $464.37 Cost per student for a North Little Rock student.

$464.37 × 475 = $220,576 North Little Rock's cost for magnet school students.

North Little Rock's expense for a regular student is $2,615.25.

$2,615.25 less $1,687.02 (State Base Equalization Rate) = $928.23 Expenditure per Regular student.

$928.23 (available funds for each student) less $464.37 = $463.86 Excess funds per magnet student over and above North Little Rock's cost.

$463.86 × 475 = $220,334 Total incentive savings for magnet participation.

PULASKI COUNTY

Magnet School Expense per Student	$2,900.81
Expense for Regular Student (Pulaski County)	$2,300.75
State Aid per Student (Table Rate)	$1,136.17
Number of Magnet School Students	1116

The State will pay one half of the expense of the Magnet Schools plus the State Aid.

$2,900.81 divided by 2 = $1,450.41 State share.

$1,450.41 – $1,136.17 = $314.24 Cost per student for a Pulaski County Student.

$314.24 × 1116 = $350,692 Pulaski County's cost for magnet school students.

Pulaski County's expense for a regular student is $2,300.75.

$2,300.75 less $1,687.02 (State Base Equalization Rate) = $613.73 Expenditure per regular student.

$613.73 (available funds for each student) less $314.24 = $299.49 Excess funds per magnet student over and above Pulaski County's cost.

$299.49 × 1116 = $334,231 Total incentive savings for magnet participation.

SUMMARY OF MAGNET SCHOOL COSTS

Total number of students—3,722
Total Cost of Magnet Students—$2,900.81 × 3,722 = $10,796,815
State will pay a total of $8,489,760*

Districts will pay a total of $2,307,055

*Note that Customary State Aid is included in this figure. Cost to the State in excess of Customary State Aid $2,210,672.

ATTACHMENT C

PROPOSAL FOR MAGNET SCHOOL PROGRAMS

SCHOOL	STUDENT CAPACITY	RECOMMENDED THEMES	ESTIMATED BUILDING RENOVATION COSTS
Williams	432	Basic Skills	None
Booker	478	Fine Arts	$ 842,720
Mann	1,194	Arts & Sciences	$2,285,374
Carver	478	Math & Science; Basic Skills	$1,821,600

Dunbar	792	International Studies; Global Cultures	$ 976,000
ibbs	348	International Studies; Global Cultues	$ 575,510
TOTAL STUDENTS	3,722	TOTAL COST	$6,501,204
		STATE'S PORTION	$3,250,602

EXHIBIT C

KAPLAN, BREWER & MILLER, P.A.

ATTORNEYS AT LAW

February 23, 1987

Honorable Henry Woods

U.S. District Court Judge

P.O. Box 3683
Little Rock, Arkansas 72203

HAND DELIVERED

Re: Little Rock School District v. Pulaski County School District, et al.

Dear Judge Woods:

Last week when the parties presented their magnet school stipulation, I added four specific items which I dictated into the record. The purpose of this letter is formally to make

these items a part of the stipulation, and to include them within the agreement of the parties. Those items are:

1. Little Rock School District commits to the appointment at each of the magnet schools of a contact person who will be responsible for adjustment problems for all transfer students.

2. Little Rock School District commits to a tight implementation schedule. Pursuant to that end, Little Rock School District will, within four weeks of the date of the execution of the magnet school stipulation present a budget for submission to all of the other parties and will submit a timeline for full implementation and opening of the magnet schools.

3. The parties agree to the concept of grade level continuity within the magnet school program.

4. Each of the parties agrees to appoint their members of the MET by the end of the week beginning February 23rd. PCSSD may require a few more days but will promptly appoint its members. The parties agree that the recruitment effort is critical to the success of the magnet program and that each is committed to pursuing agressively the recruitment effort.

The parties wish to have these items included in the magnet school stipulation.

Sincerely,

/s/ Philip E. Kaplan

Philip E. Kaplan

PEK/alh

EXHIBIT D

STIPULATION FOR PROPOSED ORDER ON VOLUNTARY MAJORITY TO MINORITY TRANSFERS

Plaintiff Little Rock School District ("LRSD"), and defendants Pulaski County Special School District ("PCSSD"), North Little Rock School District ("NLRSD"), and Arkansas State Board of Education ("State Board"), being in agreement on the voluntary majority-to-minority transfers, submit the following stipulations for the proposed order:

1. Beginning in the 1987-88 school year and continuing thereafter, LRSD, PCSSD and NLRSD will permit and encourage voluntary majority-to-minority interdistrict transfers. The three districts will cooperate in the development of programs to acquaint parents, guardians and students with interdistrict opportunities. The implementation of majority-to-minority transfer provisions is contingent upon the implementation of all other provisions of the remedy ordered by the Court.

2. Eligibility:

a. Black students who are members of the racial majority at a school in any participating district which district is 50 percent or more black in its enrollment shall be eligible to transfer voluntarily to a school and district in any other participating district in which school and district they would be in the racial minority.

b. White students who are members of the racial majority at a school in a participating district which district is more than 50% white in its enrollment shall be eligible to transfer voluntarily to a school and district in any other participating district in which they would be in the racial minority.

c. Prior to the transfer of any student, the home district shall issue a statement that the transferring student is in good standing. If the student is not in good standing, the student may be permitted to transfer on a provisional basis.

3. Students wishing to transfer shall file applications with their home districts. Applications must be filed before May 1 of the preceding school year and a student may not transfer more than once in any school yar. The home district will process all applications and forward copies to the host districts. The home district will furnish its complete file on each student with his/her application.

4. Transfer assignments will be made subject to availability of space in schools and grade levels, and the host districts' ability to comply with state standards.

5. The host district shall honor the placement for the students as certified by the home district, which shall be communicated to the parent or guardian prior to transfer. If, during the first semester, testing, performance, remedial efforts, and consultation indicate that an adjustment of placement should be made, it shall be made after the first semester in consultation with the student's parent or guardian.

6. The commitment to accept a student shall be for the duration of the student's voluntary participation. Once a student exercises his or her right to participate, the student will continue in the initially selected school for at least one full school year or until the student graduates or affirmatively withdraws from participation as herein set out. Students will not have to transfer each year or exercise a transfer choice to remain in the host district. Students shall be encouraged to continue to participate at their initial school of choice. It is expected that the student will follow the pattern of assigned schools for the resident students in the school in which the transfer student first enrolls.

7. Students who have elected to transfer shall remain students of the host district until they choose to return to the district where they reside.

8. Host districts shall not have the authority to remand transfer students to the home district. Host districts shall have the authority to discipline, suspend or expel a transfer student using the same due process procedures applicable to resident students.

9. Once admitted, transfer students will be expected to meet the same general standards, academic and other, as applied to students of the host district.

10. Information about each district's academic and disciplinary policies and procedures will be made available to prospective transfer students on request. This should include information on pupil-teacher ratios, promotion and retention, counseling assistance, grading, student code of conduct, disciplinary action, and suspension and expulsion.

11. The host district shall respond to the educational needs of students without regard to their status as a transfer or resident student. Transfer students shall be eligible and encouraged to participate in all school programs funded and sponsored by the host district (academic, athletic, extra-curricular and other) and shall not suffer any disability or ineligibility because they are voluntary interdistrict transfer students. Participation in after-school activities will be facilitated by the provision where needed of extra-curricular buses or other forms of transportation which will be available to all such transfer students, the cost of which shall be borne by the State as provided in paragraph 12.

12. The State Board shall pay the full cost of transporting students opting for interdistrict transfers. However, the State Board shall have the option of (1) paying the school districts for transporting the students or (2)

contracting for the services or (3) transporting the students with a state operated system.

13. The State Board shall pay the home and host districts in accordance with the following procedures:

a. Each year school districts shall calculate and certify to the State Board of Education their cost per student in regular schools (grades K-12) including all add-ons for special education, TAG, vocational education and other purposes. The cost per student shall include all costs for instruction and support services minus student transportation, food service, and restricted federal program costs. (To the extent that the host district does not receive pro-rata increases in restricted federal program costs by hosting transfer students who are eligible to participate in federal programs, the cost per student shall be increased on a pro-rata basis for such transfer students.) The State shall pay the costs for full-time equivalent students who have been transferred to the host district. Payments made for the current year shall be based on costs for the previous year. The host district shall report each transfer student on forms as required by the State Department of Education.

b. Each host district shall estimate the full-time equivalent of transfer students and transmit such estimate, along with the names of the students, to the State in September of each year when payment begins. A correction will be made in January of each year. Payments shall be made by the State monthly through forward funding to each district based upon the September estimate as corrected. The students transferred to the host district shall not be counted in the number used to calculate regular state aid for the district.

c. Each home district shall receive from the State for each student who voluntarily transfers from his/her home district to a host district one-half of the State aid (table rate) it would have received had the student remained in his/her home district. Information about these students shall be reported on forms as required by the State Department of Education and shall be reported at the same time as the reports are made by the host district. The students transferred from the home district shall not be counted in the number used to calculate regular state aid for the home district. All transfers of handicapped students shall be contingent on the availability of appropriate programs and resources, as identified in the IEP, at the host school.

d. The provisions contained herein do not apply to magnet schools and programs.

14. All parties to this stipulation recognize that the present racial balance of the North Little Rock School District approximates that of the entire county and they are desirous of not upsetting that balance through the operation of the Majority to Minority Transfer Program.

The parties further recognize that any court approved student assignment plan by any party could be compromised if the Majority to Minority Transfer Program caused siginficant changes in student assignment plans. To avoid this result, all parties agree that any party may choose to include or not include said Majority to Minority transfer students for purposes of student assignment under any court order.

Further, all parties recognize that substantial participation in the Majority to Minority program could have the result of creating technical departures from targeted student ratios at one or more schools. All parties agree that any such departure resulting from the lawful

operation of the Majority to Minority program shall not give rise to a claim or contention that such departure from targeted ratios constitute violations of any law or regulation and, specifically, shall never be urged or suggested as grounds for liability in this or similar litigation.

Additionally, any such resulting departures from targeted ratios shall not require the districts affected to reconstitute or recompose the student body of any affected school.

Agreed this 26th day of August, 1986.

Pulaski County Special School District	Little Rock School District
By /s/ M. Samuel Jones	By /s/ P.A. Hollingsworth
North Little Rock School District	Arkansas State Board of Education
By /s/ Philip K. Lyon	By /s/ C.R. McNair

EXHIBIT E

STIPULATION OF THE LITTLE ROCK SCHOOL DISTRICT, THE PULASKI COUNTY SPECIAL SCHOOL DISTRICT, AND THE NORTH LITTLE ROCK SCHOOL DISTRICT FOR THE CREATION OF A PULASKI COUNTY EDUCATIONAL COOPERATIVE

1. The State currently funds fifteen (15) regional educational cooperatives to provide service to school districts within identified geographic areas. Staff development, distribution of audio visual resources, "teacher center" activities, and purchasing are among the services currently being provided.

2. The three (3) school districts in this litigation were instructed by the Eighth Circuit Court of Appeals to explore cooperative programs. *Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 436 [8th Cir. 1985].

3. The parties agree that an educational cooperative should be formed and modeled after the fifteen (15) other regional cooperatives; and funded by the State in the same manner as the existing cooperatives. The name of the cooperative should be Pulaski County Educational Cooperative.

4. The parties to the stipulation agree the creation of interdistrict magnet schools, M to M transfers, and interdistrict transportation systems increase the need for cooperation and provides new avenues for further cooperative ventures. The opportunity to participate in cooperative ventures would strengthen each district's ability to provide an equitable and effective educational program for its students.

5. An interdistrict venture of this type would facilitate each district's desegregation efforts and would aid the avoidence of unanticipated effects of one district's plan on the plans of the other districts.

6. The parties agree that, within the structure of the educational cooperative, they will explore the possibility of cooperative efforts of mutual benefit. These will include, but will not be limited to, discussing the possible cooperative efforts listed by the Court of Appeals in its opinion, *LRSD v. PCSSD*, 778 F.2d 404, 430-31 (8th Cir. 1985).

7. The governing body of the cooperative will be comprised of the Superintendents of the member school districts.

Respectfully submitted,

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Attorneys for Joshua Intervenors

LITTLE ROCK SCHOOL
DISTRICT, Appellee,

v.

PULASKI COUNTY SPECIAL SCHOOL
DISTRICT NO. 1; Mac Faulkner;
Charles Stratton; Don Hindman; Mack
McAllister; Sheryl Dunn; David Sain;
and Mildred Tatum, Appellants.

Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Mayne Joshua; Rev. Robert Willingham, as next friend of minor Tonya Willlingham; Sara Matthews as next friend of Khayyan Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr., and Brian Taylor; Rev. John M. Miles, as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of the NAACIP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACIP; Katherine Knight, individually and as President of the Little Rock Classroom Teachers Association (LRCTA); LRCTA; Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; and Milton Jackson, Individually and as a Noncertified Educational Support Employee of the Little Rock School District, Appellees.

LITTLE ROCK SCHOOL
DISTRICT, Appellee,

v.

NORTH LITTLE ROCK SCHOOL DISTRICT; Murry Witcher; Ginny Jones; Vicki Stephens; Leon Barnes; Marianne Gossner; and Steve Morley, Appellants.

Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Mayne Joshua; Rev. Robert Willingham, as next friend of minor Tonya Willlingham; Sara Matthews as next friend of Khayyan Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr., and Brian Taylor; Rev. John M. Miles, as next friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of the NAACIP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACIP; Katherine Knight, individually and as President of the Little Rock Classroom Teachers Association (LRCTA); LRCTA; Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; and Milton Jackson, Individually and as a Noncertified Educational Support Employee of the Little Rock School District, Appellees.

LITTLE ROCK SCHOOL
DISTRICT, Appellee,

v.

ARKANSAS STATE BOARD OF EDUCATION; Wayne Hartsfield; Walter Turnbow; Harry A. Haines; Jim Dupree; Dr. Harry P. McDonald; Robert L. Newton; Alice L. Preston; Jeff Starling; Earle Love, Appellants.

Lorene Joshua, as next friend of minors Leslie Joshua, Stacy Joshua and Mayne Joshua; Rev. Robert Willingham, as next friend of minor Tonya Willlingham; Sara Matthews as next friend of Khayyan Davis, Alexa Armstrong and Karlos Armstrong; Mrs. Alvin Hudson as next friend of Tatia Hudson; Mrs. Hilton Taylor as next friend of Parsha Taylor, Hilton Taylor, Jr., and Brian Taylor; Rev. John M. Miles, as next

friend of Janice Miles and Derrick Miles; Rev. Robert Willingham on behalf of and as President of the Little Rock Branch of the NAACIP; Lorene Joshua on behalf of and as President of the North Little Rock Branch of the NAACIP; Katherine Knight, individually and as President of the Little Rock Classroom Teachers Association (LRCTA); LRCTA; Ed Bullington, individually and as President of the Pulaski Association of Classroom Teachers (PACT); PACT; John Harrison, individually and as President of the North Little Rock Classroom Teachers Association (NLRCTA); NLRCTA; and Milton Jackson, Individually and as a Noncertified Educational Support Employee of the Little Rock School District, Appellees.

Nos. 85—1078, 85—1079 and 85—1081.

United States Court of Appeals,
Eighth Circuit.

Submitted April 29, 1985.

Decided Nov. 7, 1985.

Before LAY, Chief Judge, and HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG and BOWMAN, Circuit Judges, En Banc.

HEANEY, Circuit Judge.

The United States District Court for the Eastern District of Arkansas, after trial, found that the defendants Pulaski County Special School District (PCSSD), the North Little Rock School District (NLRSD) and the Board of Education of the State of Arkansas (State Board) contributed to the continuing segregation of the Little Rock schools, and that an interdistrict remedy was appropriate. The district court ordered consolidation of the three school districts, establishment of a uniform millage rate, elimination of discriminatory practices,

and creation of magnet schools to enhance educational opportunities in the new district. It held that the State Board had remedial, financial and oversight responsibilities that would be detailed at a later date. The defendants appeal from the district court's order. In addition, the Joshua intervenors, representing black parents and students, filed a brief in support of the district court's judgment, and the United States filed an amicus curiae brief in general support of the appellants.

We hold that the district court's findings on liability are not clearly erroneous and that intra- and interdistrict relief is appropriate. We find, however, that the violations can be remedied by less intrusive measures than consolidation. These measures, most of which were suggested by the defendant school districts or the Joshua intervenors, include authorizing the district court to make limited adjustments, after a hearing, to the boundaries between Little Rock School District (LRSD) and PCSSD, correcting the segregative practices within each of the individual school districts, improving the quality of any remaining non-integrated schools in LRSD, providing compensatory and remedial programs for black children in all three school districts, authorizing the district court to establish, after a hearing, a limited number of magnet schools and programs open to all students in Pulaski County, and requiring the State Board to participate in funding the compensatory, remedial and quality education programs, in establishing and maintaining the magnet schools, and in monitoring plan progress. We remand to the district court for action consistent with this opinion.

I. BACKGROUND AND PROCEDURAL HISTORY.

Pulaski County is the most heavily populated metropolitan area in Arkansas, encompassing three independent school districts: LRSD, NLRSD, and PCSSD. The LRSD covers fifty-three square miles and comprises about sixty percent of the City of Little Rock. Although the population of the City of Little Rock is approximately two-

thirds white, in the 1983-84 school year, seventy percent of LRSD's 19,052 students were black. Along with NLRSD, LRSD is one of the oldest continuously operating school districts in Arkansas. The NLRSD covers twenty-six square miles and comprises nearly all of the City of North Little Rock. Its 1983-84 student population was 9,051 (36% black, 64% white). The PCSSD surrounds LRSD and NLRSD. Created in 1927 through the consolidation of thirty-eight rural independent school districts, it covers 755 square miles and contains the remainder of the county not included in the other two school districts. In 1983-84, it had 27,839 students (22% black, 78% white). Each of the three districts currently operates under a court-ordered desegregation decree, and none of the districts has achieved unitary status.

On November 30, 1982 LRSD filed this action against PCSSD, NLRSD, the State of Arkansas, and the State Board. [1] On April 13, 1983, the district court dismissed the claim against the State of Arkanas but refused to take similar action concerning the State Board, holding that the Board is a proper party in light of its general supervisory relationship with the individual school districts, and the allegations that it has carried out its duties in a manner which increased segregation in Little Rock. The district court concluded that the dismissal of the State of Arkansas had no practical effect on the disposition of the lawsuit. *Little Rock School District v. Pulaski County Special School District*, 560 F.Supp. 876, 878 (E.D. Ark. 1983). The district court separated the liability and remedy phases of

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1.
LRSD also named as defendants the Pulaski County Board of Education and the individuals serving on each of the defendant boards of education. The Pulaski County Board of Education did not participate in this litigation. The district court states, however, that the County Board has a remedial responsibility that has yet to be defined.

On September 29, 1983, the district court denied Little Rock's motion to add the Governor, State Treasurer and State Auditor as defendants.

the litigation and held liability hearings from January 3-13, 1984.

On April 13, 1984, the district court issued its decision on liability, finding that PCSSD and NLRSD had failed to establish unitary, integrated school districts and had committed unconstitutional and racially discriminatory acts which resulted in "significant and substantial interdistrict segregation." *Little Rock School District v. Pulaski County Special School District*, 584 F.Supp. 328, 351-53 (E.D. Ark. 1984). It concluded that these two school districts had taken actions which had substantial interdistrict segregative effects on education in each of the school districts in the county, and that the districts had failed to redress these segregative effects which they had perpetuated for over a century. The district court also reiterated its holding that the State Board was a "necessary party who must be made subject to the Court's remedial order." 584 F.Supp. at 352-53. It concluded that the only long- or short-term solution to these interdistrict violations is consolidation, and it scheduled hearings to consider the precise means to accomplish that end.

The first remedial hearings took place from April 30 through May 5, 1984. Before these hearings were held, a group of black parents in Little Rock, the Joshua intervenors, sought unsuccessfully to intervene in the proceedings. [2] They appealed, and on May 23, 1984, this Court ordered the district court to allow them to intervene and directed it to hear evidence from them concerning remedial alternatives to consolidation. Meanwhile, the defendant school districts had also appealed from the district court's order finding interdistrict violations and ordering consolidation of the three school districts. On May 23, 1984, we dismissed that appeal as premature but

2.
The district court had denied an earlier motion by Joshua to intervene on January 3, 1984.

suggested that the district court reopen the proceedings to permit PCSSD and NLRSD to advance remedial alternatives to consolidation. *Little Rock School District v. Joshua*, 738 F.2d 445 (8th Cir. 1984) (order); *Little Rock School District v. Pulaski County Special School District*, 738 F.2d 445 (8th Cir. 1984) (order).

The district court held further remedial hearings from July 30 through August 2, 1984, and heard evidence on alternative remedial plans submitted by PCSSD, NLRSD, and the Joshua intervenors. [3] On November 19, 1984, it issued its decision on the remedy, reaffirming its view that consolidation of the three school districts was necessary to remedy the constitutional violations. It also entered further findings concerning the State Board's liability and reaffirmed the State Board's remedial responsibilities. 597 F.Supp. at 1227-28. The district court subsequently denied motions by the defendants for reconsideration.

This appeal followed. The issues on appeal are: (1) whether the district court's findings of interdistrict violations are clearly erroneous; (2) whether the district court's remedy exceeds the scope of the constitutional violations; and (3) whether the proceedings before the district court deprived the State Board and PCSSD of due process.

II. THE DISTRICT COURT'S FINDINGS OF INTERDISTRICT VIOLATIONS ARE NOT CLEARLY ERRONEOUS.

A. Legal Background.

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The district court also heard from the McKnight intervenors, representing the teachers employed in the three districts. *Little Rock School District v. Pulaski County Special School District*, 597 F.Supp. 1220, 1227 (E.D. Ark. 1984); *see also Little Rock School District v. Pulaski County Special School District*, 738 F.2d 82, 85 (8th Cir. 1984) (allowing intervention by teacher representatives).

1. *Legal Standards in Desegregation Cases.*

Thirty years ago, the Supreme Court decided in *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), that "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal." *Id.* at 495, 74 S.Ct. at 692. Since *Brown*, the Supreme Court has affirmed the obligation of school authorities operating segregated schools "to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch." *Raney v. Board of Education*, 391 U.S. 443, 446, 88 S.Ct. 1697, 1698, 20 L.Ed.2d 727 (1968); *Green v. County School Board*, 391 U.S. 430, 437-38, 88 S.Ct. 1689, 1693-94, 20 L.Ed.2d 716 (1968). Moreover, the Supreme Court has held that "[e]ach instance of a failure or refusal to fulfill this affirmative duty continues the violation of the Fourteenth Amendment." *Columbus Board of Education v. Penick*, 443 U.S. 449, 459, 99 S.Ct. 2941, 2947, 61 L.Ed.2d 666 (1979); *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 413-14, 97 S.Ct. 2766, 2772, 53 L.Ed.2d 851 (1977) (*Dayton II*).

Before a court may impose an interdistrict desegregation remedy, it must find an interdistrict constitutional violation. In *Milliken I*, the Supreme Court explained this prerequisite:

> Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state *or* local school districts, or of a single school district have been a substantial cause of interdistrict segregation.

Milliken v. Bradley, 418 U.S. 717, 744-45, 94 S.Ct. 3112, 3127-28, 41 L.Ed.2d 1069 (1974) (Milliken I) (emphasis added).

As with any fourteenth amendment violation, a discriminatory purpose must be shown. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976); *Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); *Keyes v. School District No. 1*, 413 U.S. 189, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973). Although the discriminatory impact of state action does not in itself prove a constitutional violation, the "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance in a school system is one factor among many others which may be considered by a court in determining whether an inference of segregative intent should be drawn.' " *Columbus Board of Education v. Penick*, 443 U.S. 449, 465, 99 S.Ct. 2941, 2950, 61 L.Ed.2d 666 (1979).

Although an evaluation of basic segregative effects is important in determining the scope of a violation and hence the permissible scope of the remedy, a reviewing court is not called upon to quantify the precise segregative effects of each individual act of discrimination. *Dayton Board of Education v. Brinkman*, 443 U.S. 527, 540, 99 S.Ct. 2971, 2980, 61 L.Ed.2d 720 (1979) (*Dayton II*).

This Court has affirmed findings of interdistrict violations and has approved interdistrict desegregation remedies on several occasions. *See, e.g., Morrilton School District No. 32 v. United States*, 606 F.2d. 222, 229 (8th Cir. 1979); *United States v. State of Missouri*, 515 F.2d 1365, 1371 (8th Cir. 1975); *Haney v. County Board of Education of Sevier County*, 429 F.2d 364 (8th Cir. 1970). We have also required a state (that had been found to have committed intradistrict violations) to participate in an intradistrict remedy even though that remedy required the state to expend funds in school districts other than the violating district. *Liddell v. State of Missouri*, 731 F.2d 1294 (8th Cir.), *cert. denied*, ____ U.S. ____, 105 S.Ct. 82, 83 L.Ed.2d 30 (1984).

2. *Review of Factual Findings.*

We will not reverse the district court's factual findings with respect to liability unless we conclude that they are clearly erroneous. Fed.R.Civ.P. 52(a); *Anderson v. City of Bessemer City*, ____ U.S. ____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90, 102 S.Ct. 1781, 1789-91, 72 L.Ed.2d 66 (1982); *Dayton II*, 443 U.S. at 534 n. 8, 99 S.Ct. at 2977 n. 8; *Columbus Board of Education v. Penick*, 443 U.S. at 468-71, 99 S.Ct. at 2952, 2983 (concurring opinions of Burger, C.J., and Stewart, J.); *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 541, 92 L.Ed. 746 (1948). Nor will we reverse such findings when they are based on inferences from other facts unless the rigorous standards of the same rule are met. *Anderson*, 105 S.Ct. at 1511. The Supreme Court has emphasized the importance of the clearly erroneous rule in civil rights cases, *see, e.g., Pullman-Standard v. Swint*, 456 U.S. at 287-90, 102 S.Ct. at 1789-91, and, more particularly, in school desegregation cases:

> The elimination of the more conspicuous forms of governmentally ordained racial segregation * * * counsels undiminished deference to the factual adjudications of the federal trial judges in cases such as these, uniquely situated as those judges are to appraise the societal forces at work in the communities where they sit.

Columbus, 443 U.S. at 470, 99 S.Ct. at 2983 (Justice Stewart, with whom Chief Justice Burger joins, concurring).

B. The State's Role in the Segregation of the Three Pulaski County School Districts.

The district court detailed the history of state-imposed segregation in the public schools in the State of Arkansas

and the steps taken by the state [4] to perpetuate a dual school system, particularly in LRSD. The court pointed out that, despite the state's role in mandating and maintaining the dual system until the mid-1960's, the state had done nothing to assist in dismantling the dual system. The court further found that the state's acts had an interdistrict segregative effect with respect to the three school districts in Pulaski County. These findings are not clearly erroneous.

The state's role in the segregation of the public schools of Arkansas began in 1867 when the legislature enacted a law requiring separate public schools for blacks. Act of Feb. 6, 1867, No. 35, § 5, 1866-1867 Ark. Acts 98, 100. In 1931, this legislation was superseded by a law which required the board of school directors in each district of the state to "establish separate schools for white and colored persons." Ark. Stat. Ann. § 80-509(c) (Repl. 1980). This statute was repealed on November 1, 1983.

Even though the United States Constitution required that the black and white public schools be equal, *Cumming v. Richmond County Board of Education*, 175 U.S. 528, 20

4.

In finding that the State Board of Education was the proper agency through which the state was responsible in creating and failing to disestablish the dual school systems in Pulaski County, the district court noted:

> The State Board of Education has, by statute, general supervision over all public schools in the State of Arkansas. Ark. Stat. Ann. § 80-113. In addition to that general responsibility, the State Board and the Department of Education have numerous specific duties, including the approval of plans and expenditures of public school funds for new school buildings (Ark. Stat. Ann. §§ 80-113, 80-3506; T. 775); review, approval and disapproval of local school district budgets (Ark.Stat.Ann. §§ 80-113, 80-1305; T. 773); administration of all federal funds for education (Ark. Stat. Ann. §§ 80-123, 80-140); disbursement of State Transportation Aid Funds to local school districts (Ark. Stat. Ann. §§ 80-735, 80-736); *assisting school districts in the operation of their transportation system (T. 774); lending funds from the State*

Revolving Loan Fund to local school districts (Ark. Stat. Ann. § 80-942); approval or disapproval of bonds issued by local school districts (Ark. Stat. Ann. § 80-1105; T. 775); advising school districts regarding the issuance of bonds (T. 777); and regulation of the operation of school buses (Ark. Stat. Ann. §§ 80-1809, 80-1809.2).

The State Board of Education has broad statutory authority to supervise the public schools of the state generally, and to take what action it may deem necessary to "promote the physical welfare of school children and promote the organization and increase the efficiency of the public schools in the State." Ark. Stat. Ann. § 80-113.

The State Board of Education has the authority to promulgate regulations concerning the earmarking and use of funds used by local school districts (Ark. Stat. Ann. § 80-1305), the use of federal education funds by local school districts (Ark. Stat. Ann. § 80-142) for the administration of State Transportation Aid Funds by local school districts (Ark. Stat. Ann. § 80-735), and for the operation of school buses by local districts (Ark. Stat. Ann. §§ 80-1809, 80-1810).

The State Board of Education may lend funds from the State Revolving Loan Fund for the purchase of school buses and other equipment, for making major repairs and constructing additions to school buildings, for the purchase of sites for new school buildings, for the construction of new school buildings, and for the purchase of surplus buildings. Ark. Stat. Ann. § 80-942.

597 F.Supp. at 1227-28 (emphasis included).

The State Board does not contest these findings. Rather, it argues: first, that the district court's decision imposes financial burdens on the Board without finding that such expenditures are required to redress the effects of the Board's constitutional violations; second, that the Board was denied procedural due process by the district court; third, that the district court's findings failed to establish any causal relationship between violations found and the conditions to be remedied; and fourth, the district court's remedial order exceeds the limits necessary to correct the effects of the violations. In any event, we find no error in the district court's imposition of remedial responsibilities on the state through the State Board. *See Evans v. Buchanan*, 393 F.Supp. 428 (D.C. Del.) (three-judge panel), *aff'd*, 423 U.S. 963, 96 S.Ct. 381, 46 L.Ed.2d 293 (1975).

S.Ct. 197, 44 L.Ed. 262 (1899); *see also Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896), black public schools in Arkansas were inferior to white schools. What was true throughout the state was true for NLRSD and PCSSD. Expenditures per pupil for black children in elementary schools in these districts were substantially less than they were for white children, the salaries of black teachers in the black schools were substantially lower than they were for the white teachers in the white schools, and the illiteracy rate of black children was substantially higher than that of white children. Of particular importance in this case, the black elementary schools in these two districts were inferior to the black elementary schools in LRSD. 584 F.Supp. at 330.

The disparities at the high school level were even more pronounced than at the elementary level. Historically, LRSD maintained a high school for black students that was fully accredited by the North Central Association. *Id.* As late as the mid-1950's, however, no similar facility was maintained by PCSSD. *Id.* PCSSD paid the tuition and transportation costs for numerous black students who traveled from PCSSD to attend school in LRSD. 584 F.Supp. at 330. The district court credited several studies and the testimony of several witnesses to the effect that LRSD was identified as the school district in the state which provided educational opportunities for black students. *Id.* This identification tended to draw black students to LRSD from all over the state, and particularly from Pulaski County. [5] The state was fully aware of these disparities. Indeed, it had commissioned studies documenting that the disparities existed, and that the disparities were prominent among the factors that drew black families to Little Rock from the county and the rest of the state.

5.

Other factors encouraging migration of blacks to LRSD were jobs and public housing. 584 F.Supp. at 345. As pointed out elsewhere in this opinion, no public housing has been constructed in PCSSD, and housing and credit restrictions prevented blacks from buying or renting housing in much of that district.

> It cannot be seriously denied that the Little Rock School District's maintenance of the only North Central accredited black high school in the County and indeed in the entire area led to a concentration of blacks in this district. For almost half a century it has not only assumed the burden of giving a quality education to blacks in the County and from far corners of the State but has also been the object of racially motivated attacks by certain political and cultural groups.

584 F.Supp. at 330. [6]

6.

LRSD introduced into evidence a study which made the following conclusion:

> In sum, black students from Pulaski County crossed the district boundary to attend senior high in Little Rock from the 1920s to the 1960s. They probably became numerous in the early 1930s when Paul Laurance Dunbar High School acted as a magnet for county students who had little opportunity to attend senior high in their own district. At some point, the two districts worked out a tuition agreement under which Pulaski County paid for the use of Little Rock facilities by individual students. This led to a "county" designation on student record cards, the incidence of which shows that a substantial number of county students were enrolled at Dunbar in the 1940s and 1950s. Students from the county continued to attend Little Rock into the 1960s, but their numbers decreased as the county began to provide more and better senior high schools.

Joint Designated Record (J.D.R.) at 915-21.

This movement of blacks into LRSD, which the district court found to be "consistently understated" as shown in PX 36, 584 F.Supp. at 346, is reflected in general population statistics. From 1950 to 1980, the black population of the City of Little Rock more than doubled, from approximately 23,000 to more than 51,000. During the same period, the white population of the City of Little Rock, excluding annexed territory, declined. If the annexed territory is included, the white population increased from 79,000 to 105,000. *See* BUREAL OF THE CENSUS, 1950 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, vol. 11, part 4; BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, vol. 1. For related population statistics, *see* note 5 *infra*.

In 1953, when the Granite Mountain housing project for blacks was being planned, the state, at the behest of the affected school districts, enacted legislation authorizing the transfer of the project site from PCSSD to LRSD. This action insured that a major black housing project would be built in LRSD, and that LRSD would continue to be recognized as the school district in Pulaski County which educated black children. This housing project is discussed more fully *infra*.

Notwithstanding the state's awareness of the educational disparities between LRSD and the other school districts in the state, it took no remedial action to require adequate educational opportunities for blacks in school districts other than LRSD. [7] In summarizing the pre-*Brown* history of school segregation in Pulaski County, the district court found that, historically, "[a]s far as the education of blacks was concerned, school district boundaries in Pulaski County were ignored." 584 F.Supp. at 330.

Even after the Supreme Court's decisions in *Brown I* and *Brown II*, the State of Arkansas took no steps to dismantle the segregated school system in Arkansas or to improve the quality of the black schools in the state generally or in the defendant school districts in particular. To the contrary, it took a series of actions which delayed the elimination of the dual school system in the state for years. These actions were primarily directed against LRSD and heightened the identity of that district as the "black" district of Pulaski County.

7.

Indeed, the State Board successfully argued in a federal district court case in 1949 that black students did not have the right to attend high school within their school districts and that "the interests of Negro education will be best promoted by the maintenance of a consolidated Negro high school serving several districts[.]" *Pitts v. Board of Trustees of DeWitt Special School District*, 84 F.Supp. 975, 987 (E.D. Ark. 1949).

On May 20, 1954, three days after *Brown I*, the Board of Education announced that "[i]t is our responsibility to comply with federal constitutional requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed." *Cooper v. Aaron*, 358 U.S. 1, 8, 78 S.Ct. 1401, 1404, 3 L.Ed.2d 5 (1958). By the spring of 1955, the Little Rock Board of Education had adopted a plan which would have desegregated the schools by 1963. *Id.* A large majority of the citizens of Little Rock agreed that the plan was "the best for the interests of all pupils in the District." *Id.* The plan was approved by the federal district court, *Aaron v. Cooper*, 143 F.Supp. 855 (E.D. Ark. 1956), and this Court, *Aaron v. Cooper*, 243 F.2d 361 (8th Cir. 1957), and review was not sought in the Supreme Court.

Meanwhile, the state intervened to prevent desegregation of the Little Rock schools. In November, 1956, Arkansas's voters adopted three initiatives sponsored by the state's political leadership. These included:

> 1. An amendment to the state constitution directing the legislature to oppose *Brown* in every constitutional manner until such time as the federal government ceases from enforcing *Brown*, and providing that any employee of the state, or any of its subdivisions, who willfully refuses to carry out the mandates of this amendment shall automatically forfeit his office and be subject to prosecution under penal laws to be enacted by the legislature. Ark. Const.Amend. 44. Although this amendment remains on the books, it is recognized by the state authorities as being unconstitutional.
>
> 2. A resolution of interposition calling on all states and citizens to adopt a constitutional amendment prohibiting federal involvement in public education, and pledging resistance to school desegregation.
>
> 3. A pupil placement law, Ark. Stat. §§ 80-1519 to -1524, authorizing local boards of education or

> superintendents to transfer or reassign students or teachers among any schools within their districts, or to "adjoining districts whether in the same or different counties, and for transfer of school funds or other payments by one Board to another for or on account of such attendance." *Dove v. Parham*, 176 F.Supp. 242, 244 n. 4 (E.D. Ark. 1959).

See 584 F.Supp. at 330-32.

In January, 1957, the state legislature enacted, and the Governor signed, legislation implementing the constitutional amendment, including legislation authorizing local school districts to spend school funds to defend integration litigation, and to relieve (or at least to delay) school children from compulsory attendance at racially mixed schools. Governor Orval Faubus also signed legislation creating a state sovereignty commission, with broad powers, to:

> 1. Perform any and all acts and things deemed necessary and proper to protect the sovereignty of the State of Arkansas, and her sister states from encroachment thereon by the Federal Government or any branch, department or agency thereof, and to resist the usurpation of the rights and powers reserved to this State or our sister states by the Federal Government.
>
> 2. Give such advice and provide such legal assistance as the Commission considers necessary or expedient, when requested in writing to do so by resolution adopted by the governing authority of any school district, upon matters, whether involving civil or criminal litigation or otherwise, relating to the commingling of races in the public schools of the State.
>
> 3. Study and collect information concerning economic, social and legal development constituting deliberate, palpable and dangerous invasions of or encroachments upon the rights and powers of the State

> reserved to the State under [the Tenth Amendment to the U.S. Constitution].

See 584 F.Supp. at 330-32.

The statute also required prointegration organizations to register and report to the state sovereignty commission. *See Aaron v. Cooper*, 163 F.Supp. 13, 15 (E.D. Ark. 1958).

Notwithstanding these actions, the Little Rock Board of Education took preliminary steps to admit nine black students to Central High School in the fall of 1957. Governor Faubus, however, barred the nine students from entering Central High School by ordering the Arkansas National Guard to stand at the schoolhouse door and to declare the school "off limits" to black students. President Eisenhower responded by dispatching federal troops to guarantee the admittance of the nine black students. They were admitted after the troops arrived and the troops remained in Little Rock for the rest of the school year. Subsequently, the federal district court enjoined Governor Faubus from using the Arkansas National Guard to obstruct or interfere with court orders, *Aaron v. Cooper*, 156 F.Supp. 220, 226-27 (E.D. Ark. 1957), and this Court affirmed, *Faubus v. United States*, 254 F.2d 797, 806-08 (8th Cir. 1958).

In February, 1958 "because of extreme public hostility * * * engendered largely by the official attitudes and actions of the Governor and the Legislature," *Cooper v. Aaron*, 358 US. at 12, 78 S.Ct. at 1407, local officials petitioned the district court to postpone until at least 1961 "the plan of gradual racial integration in the Little Rock public schools" which the Little Rock Board of Education had adopted in 1955 for implementation at the high school level for the 1957-58 school year. *Aaron v. Cooper*, 163 F.Supp. 13, 14 (E.D. Ark. 1958). The district court found that "between the spring and fall of 1957 there was a marked change in public attitude toward [the school desegretation] plan," that persons who had formerly been willing to accept it had

changed their minds and had come to the conclusion "that the local School Board had not done all it could do to prevent integration." 163 F.Supp. at 21. The court noted that the state legislature's 1957-58 "enactments had their effect at Little Rock and throughout the State in stiffening opposition to the plan[.]" *Id.* Because of this state-fostered "opposition * * * to the principle of integration which * * * runs counter to the pattern of southern life which has existed for over three hundred years," *id.*, and the "corresponding damage to the educational program," *id.* at 26, and the City of Little Rock itself, the court held that a two-and-one-half-year moratorium on desegregation was necessary.

This Court reversed, *Aaron v. Cooper*, 257 F.2d 33, 40 (8th Cir. 1958), and the Supreme Court affirmed our decision on September 12, 1958, quoting with approval a pleading filed by the school board;

> The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements vilifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace.

Aaron v. Cooper, 358 U.S. 1, 15, 78 S.Ct. at 1408 (1958).

While the above appeal was pending, opponents of desegregation secured a state court injunction to prevent the opening of the "partially integrated high schools" of Little Rock. Once again, the federal district court set aside the injunction and this Court affirmed. *See Thomason v. Cooper*, 254 F.2d 808 (8th Cir. 1958).

In August, 1958, Governor Faubus called an "emergency session" of the legislature, which enacted three laws aimed at preventing the Little Rock Board of Education from complying with *Brown*. Act 4 authorized the Governor, by proclamation, to close any or all public

schools within any school district pending a referendum "for" or "against" the "racial integration of all schools within the school district;" Act 6 permitted students to transfer to segregated public or private schools across district lines if the schools they ordinarily attended were to be desegregated; and Act 9 authorized the removal by recall of any members of local school district boards. (This Act was aimed at removing from the Little Rock Board of Education those who favored desegregation.)

On September 13, 1958, Governor Faubus issued a proclamation closing the four Little Rock high schools, white and black. They remained closed throughout the 1958-59 school year, with the school board leasing the schools to a private school corporation which intended to operate them on a segregated basis. The federal courts found that such operation would be unconstitutional and enjoined the private corporation from operating the schools, *see Aaron v. McKinley*, 173 F.Supp. 944, 952 (E.D. Ark. 1959) *aff'd sub nom. Faubus v. Aaron*, 361 U.S. 197, 80 S.Ct. 291, 4 L.Ed.2d 237 (1959) (per curiam). Nevertheless, the Little Rock schools remained closed for the entire school year, and during this period, many white and some black students from Little Rock attended segregated schools in PCSSD. The Arkansas state legislature enacted a statute authorizing the state to pay for the interdistrict transfer of students from desegregated to segregated public and private schools. Ark. Acts 1959 No. 236. *See* Ark. Acts, Special Session 1958, No. 6. In 1960, an independent study described the number of transfers among the three Pulaski County school districts to preserve segregation as "excessively high." 584 F.Supp. at 339. Significant numbers and interdistrict transfers continued until 1965. PX 10.

Shortly after the school closing act was declared unconstitutional, the Little Rock Board of Education announced that it would reopen the Little Rock high schools for the 1959-60 school year because "we will not abandon free public education in order to avoid desegregation."

Norwood v. Tucker, 287 F.2d 798, 805 (8th Cir. 1961). The Board also publicly announced, however, that it awaited advice from "Governor Faubus and his attorneys * * * [on] any method whereby we may maintain compulsory segregation and still operate our public high schools." *Id.*

During the 1959-60 school year, students were assigned to particular schools in accordance with the Arkansas pupil placement laws of 1956 and 1959. Ark.Stat.Ann. §§ 80-1519 through 1524. In *Parham v. Dove*, 271 F.2d 132 (8th Cir. 1959), and *Dove v. Parham*, 282 F.2d 256 (8th Cir. 1960), we held that the Arkansas pupil placement laws were not facially unconstitutional although we recognized that the laws could in practice be used to perpetuate segregated schools. 271 F.2d at 136.

In *Norwood v. Tucker*, 287 F.2d 798 (8th Cir. 1961), we held that the Little Rock Board of Education was using "the standards and criteria * * * [of the Arkansas pupil placement laws] for the purpose of impeding, thwarting and frustrating integration." *Id.* at 808. We called the Board's attention to the continuing injunction in the first *Aaron* case requiring them to " 'take affirmative steps' * * * to facilitate and accomplish operation of the school district on a nondiscriminatory basis." *Id.* at 809.

Thereafter, the Little Rock Board of Education attempted to use the Arkansas pupil placement law in a nondiscriminatory fashion. However, in 1965, litigation was once again commenced alleging that black children were being denied admittance to predominantly white schools in Little Rock and "assigned to 'Negro' schools near their home." *Clark v. Board of Education of Little Rock School District*, 369 F.2d 661, 665 (8th Cir. 1966).

On April 22, 1965, the Board formally abandoned use of the pupil assignment law and adopted a freedom-of-choice plan. When the litigants in the *Clark* case, *id.*, alleged that this freedom-of-choice plan failed to meet constitutional

standards, the Little Rock School Board advanced "a number of desegreation plans * * * in a good faith effort to provide a solution to continuous litigation." *Little Rock School District v. Pulaski County Special School District*, 584 F.Supp. at 334. However, the Board "[u]ntil January 1967 * * * was faced with a hostile governor and state administration and an unfriendly legislature," *id.*, which helped stir up a "hysterical political atmosphere," *id.*, that led to the defeat of the several proposals for more effective school desegregation.

Little Rock continued to rely on a freedom-of-choice desegregation plan (as modified in *Clark*, 369 F.2d 661) until, by 1968, it became clear that this plan was generally ineffective and would not meet the constitutional standards which the Supreme Court had recently spelled out in *Green v. County School Board of New Kent County*, 391 U.S. 430, 438, 88 S.Ct. 1689, 1694, 20 L.Ed.2d 716 (1968); *Raney v. Board of Education of Gould School District*, 391 U.S. 443, 88 S.Ct. 1697, 20 L.Ed.2d 727 (1968); and *Monroe v. Board of Commissioners of City of Jackson*, 391 U.S. 450, 88 S.Ct. 1700, 20 L.Ed.2d 733 (1968). We noted in *Clark v. Board of Education of Little Rock School District*, 426 F.2d 1035, 1043 (8th Cir. 1970), that, despite considerable progress in desegregating several Little Rock schools, "[u]nder 'freedom of choice' in 1968-69 approximately 75% of the Negro students attended schools in which their race constituted 90% or more of the student body."

For the 1969-70 school year, the Little Rock Board of Education adopted a plan for pupil assignment based on geographic attendance zones. In *Clark*, *id.*, we held that this plan's program for student desegregation did not meet the constitutional requirement to eliminate racial discrimination "root and branch." *Id.* at 1041. We ordered the Little Rock Board of Education to file with the district court an effective desegregation plan for implemention no later than the 1970-71 school year.

Ultimately, it was not until the 1973-74 school year that most Little Rock schools were desegregated. *See* School Desegregation in Little Rock, U.S. Commission on Civil Rights 7 (June, 1977). Thus, although the Little Rock Board of Education had announced shortly after *Brown I* that it would begin to desegregate its schools by 1957 and complete the process by 1963, the active intervention of the state was a central factor in delaying desegregation of the Little Rock schools until 1973, and in contributing to the increasing concentration of blacks in LRSD. [8] The district court found that throughout this period and to this day, the state has never acknowledged its affirmative duty to assist

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8.

The district court's finding that specific discriminatory actions by the defendants had a substantial and continuing effect on the racial composition of LRSD is supported by general and school population statistics. From 1950 to 1960, the white population of the City of Little Rock declined significantly (if growth through annexation is excluded), while the white population of North Little Rock and the remainder of Pulaski County increased at an extraordinary rate. Including population gains through boundary expansions of the Cities of Little Rock (13,219 persons added by annexation) and North Little Rock (6,414 persons added by annexation), and corresponding population losses in the unincorporated areas of Pulaski County, the white population of the City of Little Rock increased by only 3,807 from 1950 to 1960 while the white population of North Little Rock increased by 11,526 and the white population of the remainder of Pulaski County increased by 13,266. These demographic data were generally contrary to statewide trends in Arkansas during the same period, and tend to support plaintiffs' theory that the state-created racial turmoil in LRSD in the 1950's fostered substantial white flight from LRSD to PCSSD and NLRSD. This trend continued throughout the 1960's and then accelerated during the 1970's. By 1980, the white population of PCSSD had increased to 123,000 from 50,000 in 1950. During the same period, PCSSD's black population increased by less than 10,000. *See* BUREAU OF THE CENSUS, 1950, 1960, 1970 and 1980 CENSUS OF THE POPULATION, CHARACTERISTICS OF THE POPULATION – ARKANSAS.

From 1956 to 1973, the black student population in LRSD increased from 3,481 to 10,274, an increase of over 87%. During the same time, the white student population of LRSD decreased from 16,242 to 11,951, a decrease of 25%. *See Aaron v. Cooper*, 143 F.Supp. 855, 860-61 (E.D. Ark. 1956), and PCSSD exhibit 9.

local school districts in their desegregation efforts and has never promulgated any rules or guidelines which would encourage the local school districts to eliminate discrimination in their school systems. Nor has it taken action to foster racially neutral school siting. Rather, it has approved racially segregative school sitings in violation of district court decrees as recently as 1980. *Id.* It has fostered impressive programs to improve the quality of education generally, but has made no effort to improve the instruction of educationally deprived and discriminatorily served black students. 597 F.Supp. at 1228. It provides funds for transportation but does not provide specific funds to aid transportation for desegregation. 597 F.Supp. at 1228. It has also failed to seek all federal funds available to aid desegregation efforts. Since the 1950's, it has encouraged consolidation of school districts to promote efficiency and quality of education, but has taken no action to encourage consolidation to end the racial segregation which it required for over a century. 597 F.Supp. at 1228. To this day, the state takes the position that Arkansas law does not permit it to assist local school boards in their desegregation efforts. Brief of Appellant State Board at 6.

C. The Pulaski County Special School District's Role in the Segregation of the Pulaski County School Districts.

The district court set forth in some detail the factors it considered significant to its holding that PCSSD had committed significiant interdistrict violations. It further found that these violations are of a continuing nature and justify imposing an interdistrict remedy which would include PCSSD. These findings are not clearly erroneous.

PCSSD was created in 1927 pursuant to Act 152 of the 1927 Arkansas Acts, which gave the residents of Pulaski County outside of the cities of Little Rock and North Little Rock the right to organize a single school district. On July

21, 1927, a consolidated school district was approved by referendum. Pursuant to this referendum, the Pulaski County Board of Education ordered that "all of Pulaski County outside the territory embraced in the cities of Little Rock and North Little Rock be created and organized into a special school district to be named and known as Pulaski County Special School District." 584 F.Supp. at 340. "The historic intention [was] that the boundaries of the cities of Little Rock and North Little Rock remain coterminous with the respective school districts[.]" 584 F.Supp. at 340.

PCSSD maintained inadequate elementary schools for blacks and was without an accredited high school for blacks until 1955. 584 F.Supp. at 329-30. Accordingly, many black elementary students from the county and any black student from the county who wished to attend an accredited high school had no reasonable alternative other than to attend the black schools in Little Rock. 584 F.Supp. at 330 ("As far as the education of blacks were concerned, school district boundaries in Pulaski County were ignored.") Pulaski County paid for many interdistrict transfers. Some black families moved from the county to Little Rock because of the disparities in educational opportunities. J.D.R. at 915-19; 584 F.Supp. at 330-40.

In 1953, PCSSD cooperated with LRSD and the state in a substantial interdistrict segregative act by permitting the annexation of lands for the construction of a black residential housing project, the Granite Mountain project, thus insuring that the black students in the project would attend school in LRSD rather than PCSSD, and enhancing LRSD's position as the school district with the responsibility of educating black children. This housing project is discussed in greater detail *infra*. When the state closed LRSD for the 1958-59 school year to avoid the desegregation of that school system, PCSSD accepted students from the Little Rock schools into the segregated schools of the county. These interdistrict transfers continued until the mid-1960's.

Until the late 1960's, LRSD generally grew as the City of Little Rock grew, and there is no contention that these annexations, with the significant exception of the Granite Mountain project, were intended to have a segregative effect.[9] In 1968, the Supreme Court announced that freedom-of-choice plans were failing to dismantle dual school systems and that "if it cannot be shown that such a plan will further rather than delay conversion to a unitary, nonracial, nondiscriminatory school system, it must be held unacceptable." *Monroe*, 391 U.S. at 459, 88 S.Ct. at 1705; *Raney*, 391 U.S. at 446, 88 S.Ct. at 1698; *Green*, 391 U.S. at 439, 88 S.Ct. at 1694. It required that segregation be eliminated root and branch. The black parents and children of LRSD took immediate action to secure compliance with these decisions. This Court complied with the Supreme Court mandate and required LRSD to implement a comprehensive plan to desegregate the schools of that district. *See Clark v. Board of Education of Little Rock School District*, 426 F.2d 1035 (8th Cir. 1970), *cert. denied*,

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9.

Cammack Village was annexed in 1948. The record does not reveal the number of students involved in this annexation and no party to this litigation attributes any discriminatory purpose to this annexation. J.D.R. 2104-06. Euclid Place was annexed in 1949. The record indicates that nineteen students were involved in this annexation. J.D.R. 2107. No party to this litigation attributes any discriminatory purpose to this annexation. Meadowcliff, Pleasant Valley and Brady were annexed in 1961. The record does not reveal the number of students involved and the parties attribute no discriminatory purpose to this transfer. J.D.R. 2108-50. Each of the annexations cited above came at a time when each Pulaski County school district was operating a dual school system. Walton Heights was annexed in 1967. The number of students involved in the annexation is not disclosed in the record, but the annexation encompassed only .0058% of the value of the real property in PCSSD. J.D.R. 2169-85. Candlewood was annexed in 1968. It was a white residential area and apparently the annexation was not a significant one as it involved only .0016 of the assessed valuation of the County. J.D.R. 2186-2202, 655, 823. In addition to the five annexations outlined above, LRSD annexed a tract of uninhabited land in 1964 for use as a site for the Metropolitan Vocational School to be open to students from LRSD and PCSSD school districts. J.D.R. 2150-68, 651. T. at 1129.

402 U.S. 952, 91 S.Ct. 1608, 29 L.Ed.2d 122 (1971); *Clark v. Board of Education*, 449 F.2d 493 (8th Cir. 1971), *cert. denied*, 405 U.S. 936, 92 S.Ct. 954, 30 L.Ed.2d 812 (1972), *aff'd*, 471 F.2d 656 (8th Cir. 1972) (mem). After the Supreme Court decided the *Green* trilogy, the concurrent annexation of lands by the City of Little Rock and LRSD ended and, from that point on, the city continued to expand, but the boundaries of LRSD remained relatively static. *Little Rock*, 584 F.Supp. at 340. The district court found that "Pulaski County Special School District's acts of freezing its boundaries to discontinue the practice of allowing City and Little Rock School District boundaries to remain coterminous springs from an unconstitutional racial motive that has significant interdistrict effects on the Little Rock School District." 584 F.Supp. at 341 (finding 26).[10]

As a result, by 1984, the City of Little Rock encompassed ninety-one square miles while LRSD covered only fifty-three square miles. Attractive industrial and residential areas in the county were made a part of the City of Little Rock but remained within PCSSD rather than becoming part of LRSD. These areas are residential sections in which many white families either lived or subsequently moved into and, as a result, their children now attend schools in PCSSD. If the boundaries of the City of

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10.

The district court found that PCSSD was interested in consolidation until the early 1970's when LRSD adopted a comprehensive desegregation plan. (The latest expression of such interest came on May 14, 1968, when the PCSSD Board agreed to accept LRSD's request for a meeting of the two boards to consider consolidation. Records and Proceedings of PCSSD Board, May 14, 1968; 584 F.Supp. at 341 finding 22.) On May 13, 1970, this Court *en banc*, in an opinion by Judge M.C. Matthes, required LRSD to implement a comprehensive desegregation plan consistent with the *Green* trilogy, decided on May 27, 1968. *Green* 391 U.S. at 439; 88 S.Ct. at 1694; *Raney*, 391 U.S. at 446; 88 S.Ct. at 1698; *Monroe*, 391 U.S. at 459, 88 S.Ct. at 1705. The district court finding that the PCSSD Board's change in attitude toward consolidation was, in part, racially motivated is not clearly erroneous.

Little Rock and its school district had remained coterminous, the black-white ratio in the Little Rock schools would now be sixty-forty rather than seventy-thirty. [11]

The district court found that the boundaries between PCSSD and LRSD had been maintained to keep LRSD predominantly black and PCSSD predominantly white. It further found that these boundary manipulations have had a substantial interdistrict segregative effect. 584 F.Supp. at

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11.

Approximately 20,000 whites and 3,000 blacks live in the areas of the City of Little Rock which are now included in PCSSD. Ten schools located in this area serve approximately 3,000 white students and 300 black students who live within the city limits. Nearly 1,500 additional white students and 323 black students living in the city are bused to PCSSD schools located beyond the city limits.

351. These findings are not clearly erroneous. [12] They were based on the facts recited herein and on the expert testimony of Dr. Robert Dentler who testified that the boundary lines had an interdistrict effect. He went on to state:

> * * * The major consequence of the boundary lines established as they were in 1928 at the peak of consolidation efforts initiated by small rural districts of the County and with the support of the State, have by now come to a condition where they keep the Little Rock School District very predominately black and limit the opportunities therein of black students.
>
> The boundaries also have generated consequences with respect to differences in State aid, State aid for instructional and related services generally and State aid for transportation. While the differences which have favored the County over the years have been remedied very recently there are all of the years in which the

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12.
The district court also found:

> Because of the large numbers of formal and informal transfers of students among the districts and the abetting of the transfers by the districts, the cooperation among the districts and their personnel in other areas, the recurrent consideration of consolidation and the long-standing practices of annexations to the two city districts, the Court finds that the three school districts in Pulaski County were not historically separate and autonomous.

584 F.Supp. at 341.

Although we find substantial evidence in the record to support the district court's findings of extensive interdistrict cooperation in attempting to confine blacks to central Little Rock, we find that the court clearly erred in finding that the three Pulaski County school districts were not separate and autonomous. Among the factors that clearly indicate that the districts were historically separate school districts are that each district has always levied its own taxes, elected its own board of education, hired its own faculty and staff, and established its own salary schedule, operating rules and regulations.

> State aid formulas supported the County to the benefit of non-black higher proportions by far of non-black students and a disadvantage both to Little Rock School District and North Little Rock.
>
> The boundaries also echo with refusals to modify them from within the Boards of Directors, at least since 1968. In other words, after years of conversation about the merits of the boundaries, about mutual assistance especially for purposes that have not to do with race, suddenly these boundaries harden and the Pulaski County Board refuses any further modification of them on the one side, and the Little Rock Board of Directors does not move or press on modifications so far as I can find.
>
> The boundaries also signify to me that under them, under the circumstances of a suburban system what was rural, what once existed as 38 rural counties, now congealed into a modernizing suburban system is such that under these boundary conditions school construction follows real estate development, not educational needs.

T. at 379-80; T. at 69; 584 F.Supp. at 340-41.

During the first two decades of tumultuous desegregation in LRSD, PCSSD schools remained segregated and free from the problems which accompanied state-resisted desegregation in Little Rock. It was not until 1968 that suit was first brought to desegregate the PCSSD schools. *Zinnamon v. Board of Education of Pulaski County Special School District*, No. LR-68-C154 (W.D. Ark. 1971), slip op. at 1. This suit remained dormant until 1970, while the Department of Health, Education & Welfare negotiated with the PCSSD Board of Education to work out an integration plan. After extensive litigation which led to an order enjoining PCSSD's discriminatory school construction plans, PCSSD consented to the entry of a decree by Judge J. Smith Henley—then Chief Judge of the United States District Court for the Eastern District of

Arkansas—integrating its schools. *Zinnamon v. Board of Education of Pulaski County Special School District*, No. LR-68-C-154 (W.D. Ark. 1973). The district court found that PCSSD had failed to comply with the Henley decree and noted that, at trial, many PCSSD Board of Education members were not even aware of the contents of the decree. Some of the more significant violations found by the court were:

1. After 1973, PCSSD continued to close schools in black neighborhoods and to build new schools in distant suburbs that were the developing areas of white population. 584 F.Supp. at 346. Many of the new schools are over ninety percent white. *Id.* For example, Northwood Junior High School was opened in 1980 in a remote location far from a black residential area and has a student enrollment which is only eight percent black. North Pulaski was built in 1977, remote from any black residential areas in the furthest reaches of Pulaski County, and in 1983, had a black student population of about six percent. Cato Elementary School was built in 1975, again in a remote area and, in 1983, it had a student population of which was less than ten percent black. Robinson Middle School was built in 1981 and, in 1983, had a black student population of slightly over eleven percent. The district court credited the testimony of Dr. Robert Dentler, plaintiffs' expert witness, that "the county took pains not to site new schools where they would be accessible to blacks, and others they dusted off old dilapidated plants and arranged to have them as walk-in schools for black students well out of reach of possible transportation by white students." There has been no new construction in or near the central part of the county, or to the east or southeast, where blacks live. The district court concluded that there were substantial and continuing inter- and intradistrict effects from PCSSD's violation of *Zinnamon's* specific order that PCSSD must cease and desist now and in the future from building schools in sites which are not equally accessible to blacks and whites. 584 F.Supp. at 346. All of these events are contrary to *Swann's*

admonition against the location of new schools "in the areas of white suburban expansion, farthest from Negro population centers." *Swann*, 402 U.S. 1, 20-21, 91 S.Ct. 126, 1278-79, 28 L.Ed.2d 554.

2. Student assignments continue to be made on a racially discriminatory basis. Thus, in 1983, of fifty-one schools in PCSSD, sixteen are racially identifiable as black schools and thirteen are racially identifiable as white schools. In some instances, neighboring schools are operated as racially identifiable schools. Thus, Mabelvale Junior High School is close to Cloverdale Junior High School (both are within the City of Little Rock but are part of PCSSD), but Mabelvale's enrollment in 1983 was only 12.7 percent black while the Cloverdale's enrollment was slightly more than thirty-three percent black. 584 F.Supp. at 354-55. PCSSD maintains racially identifiable black schools by not busing in white students and by busing in additional black students. 584 F.Supp. at 348. PCSSD buses black students to Wakefield, Watson, and Cloverdale schools even though these schools have some of the highest enrollments of blacks in PCSSD and are located a short busing distance from identifiably white schools. 584 F.Supp. at 348, 354-55. Racially identifiable white schools are maintained by not busing blacks to schools built in white neighborhoods. 584 F.Supp. at 348.

3. Similarly, PCSSD failed to apportion the burden of busing fairly among white and black students. Thus, a black student enrolled in the PCSSD system is two and one-half times more likely to be bused for desegregative purposes than a white student, 584 F.Supp. at 348, and a disproportionate number of black students in PCSSD are bused long distances, often to schools which are already racially identifiable as black. *Id.*

4. PCSSD cooperated with the City of Little Rock in the location and building of Fair and Otter Creek Schools in white neighborhoods within the city limits but just outside

the boundaries of LRSD. 584 F.Supp. at 346. Both schools are racially identifiable as white schools. Fair High School, which has a thirteen percent black enrollment, is located less than two miles from LRSD's Parkview High School which has a fifty-six percent black enrollment, and is a reasonable busing distance from PCSSD's Mills High School which has an enrollment of over forty percent black. 584 F.Supp. at 356. Otter Creek has a black enrollment of only fourteen percent, but is located near several PCSSD and LRSD elementary schools with significantly higher black enrollments.

5. PCSSD failed to meet the goals for the hiring and promotion of black principals, teachers and administrators. 584 F.Supp. at 347-48. Accordingly, there are fewer employment and promotion opportunities for blacks in PCSSD and the absence of black role models in teaching and administration. *Id.* These factors have discouraged the growth of a black community in PCSSD. 584 F.Supp. at 347.

6. The chances that a black student will be classified as educably mentally retarded are significantly greater in PCSSD than they are in LRSD. 584 F.Supp. at 350.

7. Unlike, LRSD, PCSSD has failed to develop programs to encourage the participation of black students in curricular and extracurricular activities. 584 F.Supp. at 348.

8. PCSSD has failed to comply with requirements that a biracial committee be established and that two black citizens, elected and selected by the black community, serve in ex-officio capacity on its Board of Education. 584 F.Supp. ~~at~~ at 347. This failure reduced the input of the PCSSD black community on school site selection and housing project decisions and exacerbated the historical trend of black in-migration to LRSD and white out-migration to PCSSD.

D. North Little Rock's Role in Segregating the Three Districts.

The district court found that NLRSD had committed several significant interdistrict violations. Our review of the record convinces us that the trial court's findings with respect to the violations listed below are not clearly erroneous, and that the current interdistrict impact of these violations justifies an interdistrict remedy which would involve NLRSD. We do, however, take the nature and extent of NLRSD violations into consideration in framing a remedy (which is largely intradistrict with respect to that district).

In the pre-*Brown* period, NLRSD failed to maintain equal or adequate schools for black students, particularly at the high school level. This failure led to significant transfers of black high school students from NLRSD to LRSD, and contributed to the concentration of blacks in LRSD, 584 F.Supp. at at 330, a concentration which has continued to this day.

When the LRSD schools were closed for the 1958-59 school year, NLRSD, along with PCSSD, opened its segregated schools to many white and some black students from LRSD. These transfers continued in significant numbers until the mid-1960's and played a substantial role in delaying desegregation in LRSD. 584 F.Supp. at 339-40.

NLRSD has failed to comply fully with desegregation orders of the district court, *Davis v. Board of Education*, No. LR-68-C-151 (E.D. Ark. 1977), and this Court, *Davis v. Board of Education*, 635 F.2d 730 (8th Cir. 1980), with respect to the desegregation of faculty and staff. 584 F.Supp. at 348. Thus, blacks have a measurably smaller chance of being hired as teachers or administrators in NLRSD than in LRSD.

NLRSD maintains segregation within its school system in part by grossly overclassifying its black pupils into

special education and educable mentally retarded (EMR) categories. It classifies over *nineteen percent* of its black students as retarded or learning disabled, nearly *three and one-half times as many as are similarly classified in LRSD.* 584 F.Supp. at 348. Moreover, its EMR placement rate for blacks is 8.9 times higher than it is for whites, compared to a national average placement rate of two and one-half times as many black students as white students. Placing children in Special Education: A Strategy for Equity 10 (K. Heller, W. Holtzman, and S. Messick, eds. 1982).

NLRSD argues that the overrepresentation of blacks in its EMR classes can be explained by economic and social factors, as well as differences in IQ between black and white students. The district court rejected this argument after hearing all the expert testimony on the issue. It did not err in so holding. These factors may explain why there may be more black than white EMR students, but they do not explain why the NLRSD experience should be so different than that in the nation, in Arkansas or in LRSD, nor do they explain why black students are not similarly overrepresented in the specific learning disability categories. The appellees' experts attributed this difference in EMR classification to race, and the district court was justified in accepting this opinion and in holding that this difference discouraged black students from attending that district.

E. Interdistrict Housing Violations by the Defendants.

The district court made detailed and extensive findings regarding the existence of segregated housing in the Little Rock metropolitan area and regarding the causal role of the State of Arkansas and PCSSD in creating and perpetuating this condition. After reviewing these findings for clear error, we find none, and conclude that the record amply supports the district court's determination.

The district court found that "[p]ublic housing in Pulaski County has historically been the subject of racial segregation." *Little Rock School District v. Pulaski County*, 584 F.Supp. 328, 341 (E.D. Ark. 1984). As with private housing patterns, this demographic fact is the product of interrelated discriminatory conduct on the part of the state and the county. The state delegated its responsibility in public housing to city and county governments by authorizing them to operate housing authorities upon the adoption by each of an appropriate enabling resolution. Ark. Stat. Ann. § 19-3004. The cities of North Little Rock and Little Rock have adopted these resolutions, but Pulaski County has not done so. Although the resolutions empower the cities to develop and construct public housing projects up to ten miles beyond city limits, neither city housing authority has ever build a project in PCSSD, and the record does not indicate that Pulaski County has constructed such housing. *Id.* at 341.

Typical of the pattern of development was the 1953 Granite Mountain public housing project. B. Finley Vinson, chairman of the board of the holding company which owns the largest bank in Arkansas and who was an executive with the Little Rock Housing Authority from 1950 to 1954, testified that, in the early 1950's, the state, the Little Rock Housing Authority, LRSD, and PCSSD cooperated in the development of a major all-black housing project which was intended to channel black residential development toward the far southeast boundaries of the City of Little Rock, away from white residential areas. He stated that "[i]t should be made very clear that * * * this was a device to maintain segregation of races. * * * There was no bones made about it." Although this land was part of PCSSD, the decision was also made at the state and local level for LRSD to annex this territory from PCSSD to ensure that this black development was channeled into LRSD, which was the only district capable of providing education for blacks. Mr. Vinson testified that the LRSD "worked out the annexation with the County School District." In order to

effect this transfer of land from PCSSD to LRSD, the Arkansas legislature in 1953 passed an act, Ark.Stat.Ann. § 80-436 (Repl. 1980), which allowed the land transfer without resort to the standard procedures set forth in Ark. Stat. § 80-456. Mr. Vinson testified that over 500 segregated housing units were constructed at Granite Mountain (with clearance of forty or fifty preexisting units), and that, as was expected, many more segregated housing units were built in this area in the following years. This area is still an essentially segregated black housing area served by several schools which have overwhelmingly high black enrollments ranging from seventy-one percent to one hundred percent black. [13] In sum, there is substantial evidence in the record to support the district court's finding that PCSSD cooperated with the state, the Little Rock Housing Authority and LRSD in this intentional and successful attempt to segregate blacks in a nearly all-black neighborhood and in nearly all-black schools within LRSD. 584 F.Supp. at 342.

13.

There are five schools in the general area of the Granite Mountain project and the related segregated black housing which has grown around the project. Horace Mann Junior High in 1982 had an enrollment of 654 students, 501 of whom are black. Booker Intermediate had an enrollment in 1982 of 411 students, 342 of whom are black. Rockefeller Intermediate had an enrollment in 1982 of 402 students, 288 of whom are black. Carver Elementary had a 1982 enrollment of 495 students, all of whom are black. Washington Elementary had a 1982 enrollment of 307 students, 217 of whom are black. There are no high schools in this general area, and the students from this overwhelmingly black residential area apparently attend Central High School. In sum, without considering high school students, more than 2,000 students—approximately eighty percent of whom are black—live in the Granite Mountain project and related areas. These students generally attend junior high, intermediate and elementary schools which have enrollments which are over eighty percent black. The district court credited the testimony of Dr. Charles Willie, Professor of Education and Urban Studies at the Harvard Graduate School of Education, that this all-black housing project was a significant "magnet factor" in attracting a disproportionate number of blacks to LRSD. 584 F.Supp. at 345, 347.

The district court also found that the Little Rock Housing Authority accentuated segregation in public housing and, thus, in schools, by razing black neighborhoods (which bordered on white areas) and relocating the uprooted blacks in housing projects in eastern Little Rock. White residents, whose neighborhoods were more selectively cleared, were relocated to western Little Rock. The district court found that these decisions were part of "a deliberate policy of the Little Rock Housing Authority and other governmental bodies to maintain a residential racial segregation." *Id.*

The concurrent acts of governmental bodies, especially the state and county school districts, are also reflected in the racially segregated private housing market in metropolitan Little Rock. The district court cited as especially probative of state liability the example of a black realtor who was disciplined by the state real estate commission. The realtor, who sold a home to a black in a white neighborhood, had violated a commission regulation which forbade realtors from being "instrumental in introducing into a neighborhood a character of property or occupancy, members of any race or nationality, or any individuals whose presence will clearly be detrimental to property values in that neighborhood." Although the realtor received his license, the state commission warned him about such "misconduct," and he was fired from his job. *Id.*

PCSSD also contributed to the segregated nature of the private housing market through its decisions in school siting. As Chief Justice Burger has written, "People gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the pattern of residential development of a metropolitan area and have important impact on the composition of inner city neighborhoods." *Swann*, 402 U.S. at 20, 91 S.Ct. at 1278. According to the district court's factual findings, PCSSD violated the *Zinnamon* decree by

building nearly a dozen new schools after 1973 in the furthest outlying areas of developing white populations. These schools now have enrollments that are generally over ninety percent white. *Id.* at 346. As we have noted, *supra* at 28, 91 S.Ct. at 1282, Dr. Robert Dentler testified about the racially discriminatory nature of these school siting decisions. The district court concluded that decisions on school sites were made "without any consideration given to the impact or effect such selection would have on desegregation and is therefore a constitutional violation." *Id.* at 346.

The district court's generalized factual findings (which are based on the specific facts we have recounted here) are direct and unequivocal:

> 36. These housing practices, both public and private, together with the manner in which predominantly black areas were willingly transferred to the Little Rock School District from the Pulaski County Special School District contributed greatly to the disparity in the racial composition of these school districts. * * *
>
> * * *
>
> 66. The magnet factors of relatives, jobs and public housing units have encouraged high proportions of blacks migrating to move to the Little Rock School District.

Id. at 342, 345.

After careful review of the long record compiled below we conclude that the district court's factual findings are valid and do not embody clear error according to the standard of review we have set forth above.

We also conclude that the district court committed no error of law in examining segregative housing patterns

perpetuated by the state and PCSSD. As an aspect of school desegregation cases, the housing issue was first addressed by Justice Stewart, concurring in *Milliken I:*

> Were it to be shown, for example, that state officials had contributed to the separation of the races by drawing or redrawing school district lines, by transfer of school units between districts *or by purposeful, racially discriminatory use of state housing or zoning laws,* then a decree calling for transfer of pupils across district lines or for restructuring of district lines might well be appropriate.

418 U.S. at 755, 94 S.Ct. at 3132 (emphasis added).

At least two courts of appeals have acted on Justice Stewart's suggested standard of liability and have held state governments responsible for remedying school segregation which was partially the result of state-authorized local housing authorities. [14] In the Indianapolis case, the district court recounted a long history of segregated housing, as a result of which less than one percent of Indianapolis's suburban population was black. *United States v. Board of School Commissioners,* 332 F.Supp. 655 (S.D. Ind. 1971). The court attributed residential segregation (and, hence, school segregation) in part to housing violations committed by the Housing Authority of the City of Indianapolis (HACI). The court found that, from 1957 through 1971, HACI built public housing projects in areas within the Indianapolis Public School District (IPS) inhabited ninety-eight percent by Negroes, but none in the suburban school districts. *United*

14.

Although a majority of the United States Supreme Court has not specifically addressed the extent to which houusing violations support interdistrict remedies in school desegregation cases, we note that the Supreme Court has denied certiorari in each of the cases we cite. While this does not necessarily imply approval on the merits, it is a fact which "cannot be overlooked." *Liddell v. State of Missouri,* 731 F.2d 1294, 1203 n. 8 (8th Cir. 1984), and cases cited therein.

States v. Board of School Commissioners, 456 F.Supp. 183, 189 (S.D. Ind. 1978), *aff'd in part & vacated in part*, 637 F.2d 1101 (7th Cir.), *cert. denied*, 449 U.S. 838, 101 S.Ct. 114, 66 L.Ed.2d 45 (1980). The district court held that

> the action of such official bodies in locating such projects within IPS * * * [was] racially motivated with the invidious purpose to keep the blacks within the pre-Uni-Gov Indianapolis and IPS, and to keep the terrritory of the added suburban defendants segregated for the use of whites only. * * *
>
> * * * [I]t was obvious that the natural, probable and foreseeable result of erecting public housing projects wholly within IPS territory would be to concentrate poor blacks in such projects and thus to increase or perpetuate public school segregation within IPS.

Id. at 189.

The Court of Appeals held that the district court's findings were amply supported in the record, *United States v. Board of School Commissioners*, 637 F.2d at 1110, and affirmed the district court's finding "that the decision in the 60's to locate all public housing in Marion County within the boundaries of IPS was the result of segregative intent by the responsible state agencies." *Id.* at 1111.

Although the district court in the Indianapolis case did not elaborate its reasoning, it found that, along with legislation which discriminatorily reorganized the City of Indianapolis relative to the Indianapolis School District, the state was responsible to some extent for the housing violations which exacerbated the segregation of the schools. The district court referred to HACI as a "state instrumentality," *United States v. Board of School Commissioners*, 419 F.Supp. 180, 182 (S.D. Ind., 1975), and as we have noted above, as a "responsible state agency." As a result, the state was held responsible for funding certain ancillary services as part of the interdistrict remedy, which

the Court of Appeals affirmed. *United States v. Board of School Commissioners*, 637 F.2d at 1116.

The courts reached a similar result in the interdistrict remedy that was adjudicated in the Wilmington, Delaware, case. The Wilmington Housing Authority operated over 2,000 public housing units in the city, but fewer than forty in the predominantly white suburbs, despite a period of "extraordinary population growth" in the suburbs. *Evans v. Buchanan*, 393 F.Supp. 428, 435 (D. Del.) (three-judge court), *aff'd per curiam*, 423 U.S. 963, 96 S.Ct. 381, 46 L.Ed.2d 293 (1975). As a result, the district court concluded that "[p]ublic housing policies also contributed to the concentration of minority residents in Wilmington." *Id.* The state's culpability and partial remedial responsibility in the interdistrict remedy was subsequently affirmed. *Evans v. Buchanan*, 582 F.2d 750 (3d Cir. 1978) (en banc).

The courts have not limited their attention to public housing violations; private housing discrimination has also been the basis for state liability in school desegregation cases. In *Evans v. Buchanan*, 393 F.Supp. at 434-35, a three-judge panel considered as evidence of state culpability that the Delaware Real Estate Commission, a state licensing agency, enforced a realtor's ethical canon which discriminated in the same regard as the provision cited in the case at bar. The district court reached the same result in *Oliver v. Kalamazoo Board of Educ.*, 368 F.Supp. 143, 183 (W.D. Mich. 1973), *aff'd sub nom. Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). That Court concluded that "the State of Michigan should not be allowed to escape constitutional responsibilities by fractionalizing its jurisdiction through many agencies." *Id.* at 183.

Our review of these precedents, together with the Arkansas statutes and relevant case law, is an addditional

factor justifying imposition of remedial liability upon the State of Arkansas. First, as regards public housing, we note that the municipal housing authorities implicated here are agencies of the state, which obliges the state to participate in the remedial phase of this litigation. In construing the Housing Authority Act, Ark.Stat.Ann. § 19-3004 *et seq.*, the Arkansas Supreme Court has declared:

> A Housing Authority is an agent of the state dealing with public health standards and falls squarely within the traditional police powers of the state. A City Housing Authority does not operate within the scope of "municipal affairs" (*i.e.*, those affecting, germane to or concerning the municipality and its government) as distinguished from those state officers excepted in the Home Rule Act.

Fort Smith v. Housing Authority of the City of Fort Smith, 256 Ark. 254, 506 S.W.2d 534, 536 (1974). *See also Arkansas Louisiana Gas Co. v. City of Little Rock*, 256 Ark. 112, 506 S.W.2d 555, 558 (city and housing authority do not have a principal-agent relationship).

We believe the structure of the state housing authority law supports this reading. Although the state does not operate the housing authorities *per se*, the state legislature authorized the housing authorities (Ark.Stat.Ann. § 19-3004), promulgated a finding and declaration of statewide necessity for housing reform (§ 19-3002), established standards for the appointment, qualifications and tenure of the housing commissioners (§ 19-3005), enumerated the powers of housing authorities (§ 19-3011) (including eminent domain (§19-3015), and gave the authorities the power to issue bonds (§§ 19-3017—3019).

As regards private housing segregation, we believe that the state's role in regulating real estate practices through the Arkansas Real Estate Commission, *see* Ark.Stat.Ann. §§ 17-1303, 17-1307, also implicates it in the residential segregation that contributed to the racial segregation of the Little Rock schools.

The housing violations recounted above deeply implicate the state in the constitutional violations found by the district court. Any other finding by this Court would reward the state for dividing and delegating the functions of state government among its many branches and divisions. As the district court declared in the *Kalamazoo* case:

> The State * * * cannot parcel out its jurisdiction and deliberately achieve by bits and pieces what it could not do directly by statute. When such a situation is alleged to exist, the court must look closely at the actions of each agency to determine whether it has met its constitutional responsibilities. To allow each agency to plead constitutional violations of other agencies in exculpation of its own would be to mock the Constitution of the United States[.]

Oliver v. Kalamazoo Board of Education, 368 F.Supp. 143, 185 (W.D. Mich. 1973), *aff'd sub nom. Oliver v. Michigan State Board of Education*, 508 F.2d 178 (6th Cir. 1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975). *See also* Note, *Housing Discrimination as a Basis for Interdistrict School Desegregation Remedies*, 93 Yale L.J. 340 (1983).

As a concurrent actor in the problem of housing discrimination, the PCSSD must also bear its share of the remedial burden. Where school boards have acted with complicity in developing schools in conjunction with discriminatory real estate development, they have been held responsible for their share of the remedy. *See, e.g., Oliver*, 368 F.Supp. at 171-73.

F. Summary of Violations.

The state's actions which originally segregated LRSD and then forestalled its desegregation for over twenty years are not too remote in time to be relevant for this appeal. Rather, the long history of concurrent actions

on the part of the state, PCSSD, and NLRSD exerted an unmistakable interdistrict effect on the schools of the metropolitan area by singling out LRSD as the school district which provided some educational opportunities for black students and by identifying PCSSD and NLRSD as white districts.

The acts which implicate the state as a primary constitutional violator began long before *Brown*, with a century-old, state-mandated dual school system which provided a markedly inferior education for black students. This dual system was achieved in part through the transfer of black students from NLRSD and PCSSD to LRSD. When the Little Rock Board of Education decided to comply with the Supreme Court's orders and desegregate its schools after *Brown*, the state intervened and prevented the Board from desegregating for nearly twenty years. The state persisted in opposing desegregation for thirteen years after *Brown*, and has only taken minimal actions to assist in the desegregation of its schools to this day.

Public and private housing policies exacerbated school segregation. Public housing units were segregated and most projects were built in black residential areas in LRSD or NLRSD to serve black families. No public housing units were built in PCSSD, but the Granite Mountain project was built on land deannexed by PCSSD with state approval with the intention that this all-black project would be located in LRSD and that this would ensure that black students would attend the segregated black schools in Little Rock. The effects of this action persist until this day.

The defendant school districts have acted concurrently and independently to perpetuate the interdistrict problem of school segregation. The long legacy of inferior schools for blacks in PCSSD and NLRSD (which was exemplified by the absence of an accredited black high school until after *Brown*) induced many blacks to attend school in LRSD, often with a subsidy from PCSSD or NLRSD. PCSSD has

continued to signal this attitude by ignoring the *Zinnamon* decree: it has perpetuated segregation through school siting and student assignment, unequal apportionment of the transportation burden between the races, failure to meet staff hiring goals, overclassification of black pupils in special education programs, and failure to cultivate the full participation of black students in the educational process.

Moreover, by its policies and practices with respect to annexation and deannexation, PCSSD has committed substantial interdistrict violations. Until the Supreme Court's decision in *Green* and this Court's implementation of that decision, PCSSD willingly consented to LRSD expanding simultaneously as the City of Little Rock expanded. After that year, the City continued to expand but the boundaries of the school district remained constant. There is conflicting evidence as to the reason for this, but the district court found that PCSSD declined to deannex this land for unconstitutionally discriminatory reasons, and we believe there is substantial support in the record for this finding. The effects of these policies and practices continue to be felt today. Nearly 5,000 students, more than eighty-seven percent of whom are white, now live within the city limits but attend PCSSD schools.

NLRSD has also contributed to interdistrict segregation, by failing to maintain adequate schools for blacks before *Brown*, by opening its segregated schools to LRSD transfers during 1958-59, by failing to comply with the desegregation orders of the district court, by grossly overclassifying its black pupils in EMR programs and by failing to desegregate the faculty and staff of its schools.

We believe it is clear that these actions by the defendants exerted a strong interdistrict influence which polarized the races and, by creating disparities in the availability and quality of black schools, set aside LRSD as the best place for black students to obtain an education. Undoubtedly, a significant percentage of white out-

migration and black in-migration is attributable to factors other than racially discriminatory acts of the defendants. (These factors include the historical movement of white middle-class families from the city to the suburbs and the higher fertility rate of black families. [15]) However, plaintiffs introduced substantial evidence demonstrating that a "disproportionate" number of whites, 584 F.Supp. at 347, left LRSD or moved into PCSSD instead of LRSD upon moving from other areas and that substantially more blacks moved into LRSD than would otherwise have done so in the absence of the defendants' discriminatory actions and the resulting racial turmoil in LRSD. [16] The district court found, *id.*, that plantiffs met their burden of proving that the defendants had committed substantial interdistrict constitutional violations with substantial and continuing interdistrict effects. In light of the substantial supporting evidence in the record, we cannot declare these findings clearly erroneous.

The defendants and amicus argue strongly that *Milliken I, supra*, *Lee v. Lee County Board of Education*,

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15.

Significant numbers of white children attend private or parochial schools in Pulaski County. We are not able from this record to determine that the discriminatory acts of the defendants have contributed to this phenomenon, particularly in view of the fact that the number of students attending the schools in Pulaski County happens to be consistent with national norms for metropolitan areas.

16.

The district court credited the testimony of Dr. Charles Willie, Professor of Education and Urban Studies at the Harvard Graduate School of Education, that the various intentionally discriminatory actions of the defendants outlined in this opinion contributed to the disproportionate movement of whites into PCSSD instead of LRSD. 584 F.Supp. at 347. He testified that, among other factors, the concentration of public housing projects in LRSD (particularly the all-black Granite Mountain project which served as the seed for three decades of segregated housing development), the existence of LRSD boundaries not coterminous with the City of Little Rock, and PCSSD's numerous violations of the *Zinnamon* decree (including school site locations) were of significance.

639 F.2d 1243 (5th Cir. 1981), and *Goldsboro City Board of Education v. Wayne County Board of Education*, 745 F.2d 324 (4th Cir. 1984), dictate a contrary result. We disagree. In *Milliken I*, there was no history of state-imposed segregation, nor of state opposition to the local school district's attempt to comply with *Brown*, nor was there a history of interdistrict transfers, boundary changes, housing violations, and violations of desegregation decrees. Moreover, *Milliken I* involved the consolidation of one city district with fifty-three suburban districts in three counties, where the record was devoid of evidence indicating that the fifty-four districts were closely interrelated geographically, economically, politically and culturally, as the districts are here.

There are some superficial similarities between this case and *Lee*. In *Lee*, as here, there were two suburban districts and one city district located in a single county, and there was a history of interdistrict transfers in the pre-*Brown* period. But in *Lee*, the district court found that the interdistrict violations that had occurred were neither continuing nor significant, and the Court of Appeals for the Fifth Circuit simply held that this finding was not clearly erroneous. Here, as we have already noted, the district court found that the interdistrict violations were significant and continuing, and we simply hold that these findings are not clearly erroneous. Moreover, *Lee* did not involve segregative interdistrict transfers, segregative boundary changes, or state-imposed residential segregation, and the city district had been previously declared unitary.

Goldsboro is also distinguishable from this case on several grounds. Goldsboro had been declared a unitary school system by the federal district court in 1973, *id.* at 325-26. Although the Goldsboro district alleged that Wayne County had established "white haven" schools, the district court found that the Wayne County school district built only one school during the period in question, to replace a

sixty-year old school building. Here, PCSSD built nearly a dozen schools during the relevant period, and the district court found specifically that "the selection of sites for new schools built after the entry of the *Zinnamon* decree has been made without any consideration for the impact such selection would have on desegretation." 584 F.Supp. at 336-37. *See also id.* at 346.

Further, in *Goldsboro*, there was no showing that any government official or agency had ever opposed the location or construction of public housing within the Wayne County school district. 745 F.2d at 327. Moreover, there was no history of interdistrict transfers for segregative purposes, no district court finding of segregative annexations or boundary changes, nor any evidence of school district failure to comply with desegregation decrees.

III. THE REMEDY.

A. Proposed Remedies.

[12-16] From July 30, 1984, to August 2, 1984, the district court reopened the hearings to consider the appropriate remedy for interdistrict violations. [17] At the hearings, PCSSD and NLRSD each offered an alternative.

1. *PCSSD's Alternative.*

PCSSD submitted its plan on July 24, 1984, six days before the remedial hearing. The plan preserves the autonomy of the three county school districts and relies on the creation of a substantial number of speciality or magnet schools and "voluntary interdistrict transfers with mandatory backup." 597 F.Supp. at 1222.

17.

The State Board, NLRSD and PCSSD argue on appeal that they were deprived of procedural due process in the course of the proceedings before the district court. We reject this contention.

The State Board argues that it was deprived of due process because the district court entered further findings on the State Board's liability in the remedial order, after the court had said it had concluded all proceedings concerning liability. We find no error in the district court's clarification of the State Board's liability. All findings by the district court concerning the State Board in the remedial order have substantial support in the record of the liability hearings, at which the State Board had a full opportunity to be heard.

NLRSD's several due process objections are similarly unpersuasive. It argues that the district court improperly ordered consolidation at the conclusion of the liability proceedings while limiting the remedial hearing solely to the question of the proper *means* of consolidation. We conclude that any possible problems with the scope of the remedial hearings were cured when the district court reopened the remedial proceedings and heard testimony on alternative remedies. NLRSD complains that it was deprived of the opportunity at the reopened proceedings to cross-examine LRSD's experts, but a careful review of the record shows that the district court committed no error or abuse of discretion in this regard. NLRSD, in fact, was only deprived of the chance to recross-examine LRSD's expert witness, Dr. Dentler. The record indicates that NLRSD was able to cross-examine LRSD's expert for one and one-half hours, and we conclude that the district court was fully within its discretion to deny further inquiry. (We note also that PCSSD cross-examined Dr. Dentler extensively. None of NLRSD's other references to the record reveal improper limitation by the district court of NLRSD's opportunity to cross-examine witnesses. Nor was NLRSD improperly deprived of an opportunity to present its own expert testimony. The district court was well within its discretion in excluding NLRSD's proffered evidence concerning surveys and other testimony about the extent of interdistrict effects. NLRSD had an adequate opportunity to present such evidence concerning the scope of the violations at the liability hearings, and the district court properly limited the scope of the remedial hearings to alternative remedial plans.

PCSSD raises similar due process complaints which we reject as well. Any concern with the district court choosing consolidation as the appropriate remedy in its order at the conclusion of the liability proceedings was alleviated by the opportunity to present remedial alternatives. Moreover, the district court's findings concerning liability were sufficient to allow PCSSD to present remedial alternatives which would address the scope of the violations.

PCSSD's plan calls first for the creation of a "substantial number of special schools and special program offerings * * * in each of the three present school districts," in addition to the traditional curriculum offered at "standard schools." J.D.R. at 2497. Suggested themes for specialty schools and programs in elementary schools include a gifted and talented program, a physical development program, a multi-language program, a lab school, a Piaget model school, an extended school day center, a Montessori school, a creative arts school, a personalized education program and a computer/science/math program. Junior high school themes include a gifted and talented program, visual communication, pre-international Baccalaureate program, physical development, arts program, ecology and environmental education, and math/science. Senior high school themes include college prep high school, high school for the performing arts, law enforcement program, engineering, communications, math/science, military academy, computer technology and business, electronics, drafting, ecology and environmental education, and a gifted and talented program.

PCSSD's plan requires all students in the three districts to choose the school they wish to attend, selecting from among any of the schools in the three districts. Students who do not receive their first or second choice of school due to oversubscription are to be "mandatorily assigned [to another school] by an interdistrict administrative committee composed of administrative personnel from each of the three districts."

Enrollments are to be controlled "to racially balance all schools in each of the controlled three districts at proportions approximating that of countywide public school enrollment in the preceding school year. * * * Specialty schools and specialty programs will be racially balanced at the countywide proportion plus or minus five percentage points." J.D.R. at 2506-07. Individual racial balance goals

are proposed at "remote schools" with a minimum requirement by 1988-89 so that no less than fifteen percent of the remote school enrollment will be black. To facilitate interdistrict transfers, several policies are proposed, including the "effective schools" model and uniform grade structure including kindergarten, uniform grading, attendance and discipline policies.

PCSSD proposes that the three districts share vehicle capacity, routing and supervision of the transportation system, that they consider the joint contract purchase of a computerized routing and scheduling system, and the purchase of identical vehicles, the joint purchase of fuel and parts, the sharing of repair facilities and enforcement of common regulations. J.D.R. at 2509. Its plan requires that the costs associated with interdistrict assignment of students be shared by all three districts in an equitable manner and that districts receiving students from another district be reimbursed on a per capita basis. J.D.R. at 2511. It notes that, although transportation costs should be shared, financial support from the state must be made available. *Id.*

PCSSD also proposed the formation of several tri-district committees which would discuss cooperative ventures in several areas such as food preparation and delivery and maintenance service. Under this proposal, the three district controllers would meet in committee to discuss details of cost sharing and to explore other areas of financial cooperation, including establishment of a single millage rate in Pulaski County, coordinated millage campaigns, coordinated marketing of revenue bonds, common audit and accounting procedures, joint proposals for special grant or project funds, and joint bidding and purchasing practices. PCSSD would require the formation of a similar committee to "formulate and suggest criteria for the opening and closing of facilities as well as for renovating or expanding existing schools." Under its proposal, it would appear that the committees would be biracial.

PCSSD proposes that faculty from all three districts be recruited to teach in the specialty schools, and that teachers accepting interdistrict assignments maintain contractual relationships with their home districts but that they be subject "to all other rules and procedures applicable to the schools in which they teach." PCSSD also proposes interdistrict cooperation on a variety of personnel matters.

PCSSD's principal objection to the consolidation remedy ordered by the district court is that it destroys the institutional strengths of an ongoing school district and impedes local control of public schools. *See Milliken v. Bradley*, 433 U.S. 267, 280-81, 97 S.Ct. 2749, 2757-58, 53 L.Ed.2d 745 (1977) (*Milliken II.*)

PCSSD argues that its plan "would represent a strong step forward both in raising the quality of education for all and in improving the prospects for a permanently viable, racially-integrated system of public schools throughout Pulaski County." J.D.R. at 2517. The district court found, however, that PCSSD's plan places "undue reliance on voluntary transfers * * * [and] fails to adequately address the interdistrict segregative effects found to exist and cannot be approved." 597 F.Supp. at 1223.

2. *NLRSD's "Masem/Western Wedge" Alternative.*

Shortly before the July 30, 1984, remedial hearing, NLRSD submitted a statement which argued that consolidation of the three districts exceeds the scope of the interdistrict violations found by the court, and, particularly, those attributable to NLRSD, but that "NLRSD believes that the deannexation violation of the Pulaski County School District requires remedy. A fair and equitable remedy would be to adopt a 'western wedge' concept similar to that proposed by Dr. Paul Masem in Intervenor Joshua Exhibit Number 2, Option A." J.D.R. at 1788.

The "Masem/Western Wedge Plan" calls for all three districts to retain their separate and autonomous identities. The boundaries of NLRSD would remain unchanged, but the boundaries between LRSD and PCSSD would be changed to "compensate for the loss of approximately 4,000 white students to the Little Rock School District caused by [PCSSD's] deannexation violation." J.D.R. at 1787-88. PCSSD north and west of Interstate 30 and south of the Arkansas River would become part of LRSD. LRSD east and south of Interstate 30 would become part of PCSSD. As a result of the proposed boundary changes, "the racial composition of the districts, not counting student transfers between districts, will be as follows:

Pulaski County Special School District	69%(W)	31.%(B)
Little Rock School District	46%(W)	54%(B)
North Little Rock School District	64%(W)	36%(B)

NLRSD proposes an interdistrict magnet school program and an interdistrict majority-to-minority (m-to-m) student transfer program to promote desegregation in the three districts. Ten to twelve magnet schools, which would offer programs such as computers, math and science and back-to-basic fundamental schools, would be located in central Little Rock. The m-to-m program would provide transportation between all Pulaski County schools within some maximum travel time such as thirty to forty-five minutes. Each school in Pulaski County with less than thirty percent black enrollment would set aside seats for transfer students, with priority for Little Rock black students.

An Interdistrict Policy Board, with representatives from each district and from the Joshua intervenors, would be established to administer and coordinate the various provisions of the plan. The Board would receive funding from each of the three school districts, and it would

establish a citizens' advisory board to channel community input and participation.

NLRSD's plan also calls for compensatory and remedial programs in all three districts to increase the educational achievement of black students. The Interdistrict Policy Board would hire outside consultants to ensure that all three districts have adequate compensatory programs.

The district court rejected the NLRSD plan on the ground it "places too much reliance upon the voluntary motivations of the county patrons [and] there are insufficient incentives * * * to expect the [interdistrict] transfers * * * to be successful in desegregating[.]" 597 F.Supp. at 1223. The court concluded that "the NLRSD plan fails to adequately address the interdistrict constitutional violations found by the Court[.]" *Id.*

3. *The Joshua Intervenors' Alternative.*

The Joshua intervenors did not advance a particular plan but presented a position statement in favor of consolidation but which was critical of several aspects of LRSD's consolidation plan. Their expert witness, Dr. Paul Masem, testified about three plans for remedying the inter- and intradistrict violations short of consolidation. These plans were primarily concerned with alterations in the present boundaries of the three districts. The district court rejected the options on the ground they would not "adequately remedy the constitutional violations found by the Court." 597 F.Supp. at 1224.

4. *The LRSD Alternative.*

The district court determined that LRSD's plan was the only proposal which would adequately address the interdistrict and intradistrict violations which were established at trial.

The principal component of the LRSD plan is consolidation of the three school districts. This plan utilizes a geocoding process of arriving at student assignment areas, and it divides Pulaski County into six subdistricts. The plan establishes a racial composition standard of (+) or (–) twenty-five percent of the racial makeup of the student population. To facilitate student transfers, the schools are to be of equal quality and grade structure.

LRSD's plan also calls for the creation of magnet schools at Metropolitan Vocational High and in areas populated primarily by blacks. The plan calls for desegregation of administrative staff at all levels and in all units. It provides for an interim board of directors which will select a qualified school superintendent. The court stated that it would soon set the date for an election of persons to replace the interim court-appointed board. The court also determined that, after study by the new superintendent and the interim board, a determination would be made as to the millage rate to be uniformly applied within the consolidated district.

The court also directed the three districts to hold at least three public meetings in their districts to explain the consolidation plan and to accept constructive criticism. The court then determined that it was premature to address the concerns of the Knight intervenors with respect to faculty assignments because many potential contract problems should first be dealt with by the interim boards.

Finally, the court reiterated that the state had taken actions and inactions over the years which "had an interdistrict effect upon the Little Rock, Pulaski County and North Little Rock school districts." 597 F.Supp. at 1228. "Other branches of the state, as set forth in the court's earlier opinion * * * share responsibility with the State Board for these constitutional violations, but the State Board must be the remedial vehicle for their violations as well[.]" 597 F.Supp. at 1228 (citations omitted). The court

then stated that it would detail the "precise nature of these financial and oversight obligations" at a later date. *Id.*

B. The Required Remedy.

Having found interdistrict violations by the state and defendant school districts, and having heard from all of the parties concerning the remedial alternatives, the district court was responsible for devising a remedy that would correct the constitutional violations that it found. A federal court has broad equitable power to devise a desegregation remedy. The overriding goal of such a remedy is to eradicate all vestiges of state-imposed segregation. *Swann v. Board of Education*, 402 U.S. 1, 15-16, 91 S.Ct. 1267, 1275-76, 28 L.Ed.2d 554 (1971); *Green*, 391 U.S. at 437-38, 88 S.Ct. at 1693-94. Three equitable principles guide the courts in this process: (1) the nature of the remedy is determined by the nature and scope of the violation; (2) the remedy must, to the greatest degree possible, be designed to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct; and (3) the courts must take into account the interests of state and local authorities in managing their own affairs, consistent with the Constitution. *Milliken II*, 433 U.S. at 280-81, 97 S.Ct. at 2757-58.

In constructing a desegregation remedy, a court may not rigidly require a particular racial balance. *Pasadena Board of Education v. Spangler*, 427 U.S. 424, 436-38, 96 S.Ct. 2697, 2704-06, 49 L.Ed.2d 599 (1976); *Milliken I*, 418 U.S. at 739-40, 94 S.Ct. at 3124-25; *Swann*, 402 U.S. at 22-25, 91 S.Ct. at 1279-81. Nevertheless, the Supreme Court has made it clear that the awareness of the racial composition of a school district or school districts is a useful starting point in developing an effective remedy, and thus the limited use of racial ratios is within the Court's equitable discretion. *Swann*, 402 U.S. at 25, 91 S.Ct. at 1280.

Thus, the Supreme Court has approved a remedy imposed by the district court requiring that all schools in the school district be roughly within the same racial balance. *Columbus Board of Education v. Penick*, 443 U.S. 449, 455 n. 3, 99 S.Ct. 2941, 2945 n. 3, 61 L.Ed.2d 666 (1979); *Swann*, 402 U.S. at 23-25, 91 S.Ct. at 1279-80. Our Court has consequently approved the use of flexible ratios in desegregation remedies on numerous occasions. *E.g.*, *Liddell v. State of Missouri*, 731 F.2d at 1302 & n. 7; *Clark v. Board of Education of Little Rock*, 705 F.2d 265, 269 & n. 6 (8th Cir. 1983); *Liddell v. Board of Education of St. Louis*, 667 F.2d 643, 649 & n. 6 (8th Cir. 1981); *Adams v. United States*, 620 F.2d 1277, 1296 & n. 30 (8th Cir. 1980); *Morrilton School District No. 32 v. United States*, 606 F.2d 222, 230-31 (8th Cir. 1979); *Booker v. Special School District No. 1*, 585 F.2d 347, 353-55 (8th Cir. 1978); *United States v. School District of Omaha*, 521 F.2d 530, 547 (8th Cir.), *cert. denied*, 423 U.S. 946, 96 S.Ct. 361, 46 L.Ed.2d 280 (1975). In any event, in this case, we have closely tailored the remedy to the violations and we are not requiring a particular racial balance in each district.

We sustain the district court's holding that the interdistrict violations by the defendants justify interdistrict relief to the extent noted below. The more troublesome question is whether the district court erred in holding that consolidation was the only remedy that would effectively cure the interdistrict violations. We hold that the district court erred in that regard. In so holding, we express our agreement with the district court that consolidation would be a cost-effective and efficient method of desegregating the three school districts, but under *Milliken I*, we cannot require that remedy unless it is essential to correct a constitutional violation.

For three reasons, we do not believe we can require consolidation. First, that remedy exceeds the scope of the violations. It was based in part on the finding that the school districts were not autonomous, and we have held that that

finding is not supported by the evidence. To be sure, the three districts did cooperate with each other through the late 1960's to maintain a dual school system in each of the districts, but each district retained its own identity, elected its own school board, fixed its own budget, hired its own faculty and staff, developed its own transportation system, constructed its own schools, and either agreed or disagreed to proposals to annex or deannex sections of its district to another. [18]

Second, other remedial measures are better designed to restore the victims of segregation in the Pulaski County Schools to the position they would have occupied absent discriminatory conduct. Thus, the violations relating to annexations and deannexations, segregated housing, school siting, student assignments, special education, transportation, employment of faculty and administrators, and black participation in school affairs can all be corrected by the carefully tailored guidelines for a remedy to be established by the district court as set forth below.

Third, the remedy we have set forth preserves the important interests the three school districts have in managing their own affairs. As the Supreme Court stated in *Milliken I*, "the notion that school district lines may be casually ignored or treated as a mere administrative convenience is contrary to the history of public education in our country. * * * Local- autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to the quality of the educational process." *Milliken I*, 418 U.S. at 741-42, 94 S.Ct. at 3125-26.

18.

Additionally, the district court, in reaching its decision that the districts were not autonomous, gave weight to the fact that many white students transferred from PCSSD to NLRSD and LRSD in the period from 1954 to 1973, and that tuition in most instances was paid for by the sending to the receiving district. We do not feel that these transfers constitute sufficient evidence to establish a lack of autonomy.

In the light of the above circumstances, and the equirement that our remedy be closely confined to one that will remedy violations found to exist, we remand to the district court with directions to modify its remedy [19] to embody the following principles:

1. Each school district shall remain independent with an elected school board with its own administrative structure and powers of taxation.

2. The boundaries of NLRSD are to remain as they are at the present time. This is in partial recognition of the fact that the nature and extent of its interdistrict violations are less severe than those of the other defendants. Moreover, the black-white school population of this district approximates that of the county as a whole. Little or no good purpose would be served by changing its boundaries. The NLRSD, however, shall be required to correct each of the constitutional violations found by the district court, and to comply fully with the prior orders of the district court and this Court. It will thus be required to make the necessary modifications to its student assignment plan, the employment of black administrators and principals, and the adoption of a racially neutral plan evaluting and placing

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19.
28 U.S.C. § 2106 provides, in pertinent part:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review[.]

Appellate modification has been described as an "inherent ability," *Petition of U.S. Steel Corporation*, 479 F.2d 489, 500 (6th Cir. 1973), *cert. denied*, 414 U.S. 859 (1974), which this Court has exercised on several occasions, *e.g. In re Thompson*, 642 F.2d 227, 229 (8th Cir. 1981) (en banc). The Fifth Circuit has exercised its authority under this section to modify district court remedies in school desegregation cases. *Conley v. Lake Charles School Board*, 434 F.2d 35, 39 (5th Cir. 1970); *Ross v. Dyer*, 312 F.2d 191, 194 (5th Cir. 1963); *Bush v. Orleans Parish School Board*, 308 F.2d 491, 503 (1962).

students requiring special education. It will also be required to cooperate in the interdistrict aspects of the remedy outlined herein.

3. The district court, after a hearing, shall adjust the boundaries between PCSSD and LRSD as follows:

(a) All land within the City of Little Rock shall be assigned to LRSD, and the students living in that area shall be assigned to schools in LRSD. [20]

(b) All land in the Granite Mountain area will be included in PCSSD, and the students living in that area shall be assigned to schools in PCSSD. The record is not clear as to the precise boundaries of this area, thus evidentiary hearings will be held by the district court to determine them. It is the intent of this Court that the boundaries of this area shall reasonably reflect the area that was impacted by the 1953 deannexation of land from PCSSD to LRSD.

(c) In lieu of the adjustments indicated in (a) and (b), the district court, upon application by a party to this appeal, may conduct evidentiary hearings to determine whether adjustments other than those indicated in (a) and (b) would have substantially the same impact on the student populations of each district and would better meet the educational needs of the students of the districts involved. After such hearings, the district court may make adjustments to the boundaries other than those indicated above if it finds that they would better meet the educational

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20.

This remedy is based on all of the defendants' interdistrict violations outlined in this opinion, including the violations relating to school sitings, annexations and deannexations, lack of any low-income public housing PCSSD, student assignments, special education, transportation, employment of faculty and administrators, as well as the pre-and post-*Brown* interdistrict transfers and the other historical violations with continuing effect.

needs of the students, and would remedy the constitutional violations to the same extent as the adjustments in (a) and (b).

4. After the boundaries between LRSD and PCSSD have been adjusted, each school district as reconstituted shall be required to revise its attendance zones so that each school will reasonablay reflect the racial composition of its district. Consistent with earlier district court orders with respect to these schools, school districts may, where necessary, be permitted to depart from this remedial guideline in that school enrollments may over-or underrepresent blacks or whites by as much as one-fourth of the remedial guideline for either race. We see no reason why, on this record, the variance should exceed this level. *See Columbus*, 443 U.S. at 455, n. 3, 99 S.Ct. at 2945, n. 3; *Swann*, 402 U.S. at 23-26, 91 S.Ct. at 1279-81. If the four all- or nearly all-black elementary schools as conditionally allowed by this Court in *Clark v. Board of Education of Little Rock*, 705 F.2d 265 (8th Cir. 1983), are retained in LRSD, compensatory and remedial programs of the type that we required for the nonintegrated schools in St. Louis shall be put into effect for the four schools. *See Liddell v. State of Missouri*, 731 F.2d at 1312-18. The additional cost of these programs shall be paid for by the State of Arkansas.

The district court may also consider the special problem of a few remote schools in Pulaski County. The June 4, 1973, decree of Judge J. Smith Henley permitted PCSSD to deviate from the racial standards that he established for the school system by allowing deviation from the standard in one or two schools distant from the black community. The district court should consider whether the exception granted by Judge Henley should be permitted to continue.

5. Voluntary intra- or interdistrict majority-to-minority transfers shall be encouraged, with the State of Arkansas being required to fund the cost of transporting

students opting for interdistrict transfers and to pay benefits to the sending and receiving schools for the interdistrict transfers similar to those required to be paid in *Liddell*. All three defendant school districts in Pulaski County shall be included in this program. To facilitate these transfers, the proposals of the PCSSD for "effective schools model," uniform grade structures, grading, attendance and discipline policies shall be carefully considered.

6. The district court may require a limited number of magnet or specialty schools or programs to be established at locations to be determined initially by a Magnet Review Committee and approved by the district court after a hearing. (Both PCSSD and NLRSD have made thoughtful proposals in this regard.) The magnet schools, if ordered, shall be administered by a Magnet Review Committee with one person to be named by each school district and two persons to be named by the State of Arkansas. The State of Arkansas will be required to pay the customary state aid to any pupils attending these schools, plus an additional one-half of the cost of educating the students attending them. The local share of the cost of any magnet school established shall be paid by the three participating schools on a basis to be determined by the district court. The state shall also be required to pay one-half of the cost of the construction or rehabilitation necessary to house the magnet schools and the full cost of transporting any students who attend them. *See Liddell VII*, 731 F.2d at 1309-12. [21]

7. PCSSD's proposals with respect to cooperative programs set forth on pages 430-31 of this opinion should be

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21.

On the basis of *intra*district violations in *Liddell*, this Court ordered the State of Missouri to pay for programs similar to those described in paragraphs 5 and 6. *Liddell v. State of Missouri*, 731 F.2d 1294, 1305-12. Thus, even if there were no interdistrict violations in this case, on the basis of intradistrict violations by the state, this Court may order a similar remedy against the state.

seriously considered by the district court and implemented where feasible.

8. If the boundary changes result in PCSSD or LRSD losing a substantial portion of their tax bases, the district court shall consider measures to equalize the tax rates in these districts. The court may also consider whatever other financial measures it or the parties consider necessary, including retirement of bond issues, to ensure an equitable transfer of benefits and obligations accompanying the boundary changes and the corresponding transfer of physical plant and related debt.

Each party to this appeal is to bear its own costs, with the exception of the Joshua Intervenors, whose costs will be borne equally by the State Board, LRSD, PCSSD and NLRSD.

This action is remanded to the district court for further action consistent with this opinion.

ARNOLD, Circuit Judge, concurring in part and dissenting in part.

I.

I agree with much of the Court's able opinion. In particular, I approve completely of its decision not to order consolidation of the three school districts now operating in Pulaski County, Arkansas. Consolidation would mean destruction of three popularly governed units of local government, and substitution in their stead of one judicially created and judicially supervised school district. Such a remedy is well within the judicial power of the United States, and I should not hesitate to support it upon proper proof, but the proof here is insufficient for several reasons, the most important of which is that the remedy of consolidation "exceeds the scope of the [parties' constitutional] violations." *Ante* at 434. Consolidation is a drastic step that should be reserved for clearer cases.

Having rejected consolidation, the Court proceeds to analyze the record and set out a detailed remedial decree, to be administered by the District Court on remand. The relief ordered today differs greatly from that ordered by the District Court. If we are not prepared to affirm what that court has done, we should remand this case for further findings and a detailed remedial decree. Although we have *power* to modify a decree at the appellate level, it is unwise to exercise that power. The District Court (though we are today disagreeing with some of its conclusions) is presided over by a scholarly and distinguished judge. That court, not this one, is in the best position to write a decree. Instead, a decree today springs full-grown from the brow of this Court, a decree that will, I dare say, startle all the parties to this case, including even those (if there are any) who like what they see.

Since the Court has decided to award detailed relief at the appellate level, however, it is appropriate for me to indicate in what respects I agree with its opinion. I agree that the District Court's findings of intradistrict violations on the part of the North Little Rock School District (NLRSD) and the Pulaski County Special School District (PCSSD) are not clearly erroneous and should be affirmed. These violations should be corrected. Moreover, the Court properly declines to change the boundaries of NLRSD. Its constitutional defaults have not been shown to have any significant current interdistrict effect. It is also appropriate to order compensatory and remedial education programs for the four virtually all-black schools that we allowed in the Little Rock School District (LRSD) in *Clark v. Board of Educ. of the Little Rock School District*, 705 F.2d 265 (8th Cir. 1983). (A similar remedy might also be in order for some racially identifiable schools in NLRSD and PCSSD.) The State of Arkansas should pay for these programs. The State's long-continued violation of the Fourteenth Amendment has played a significant part in bringing about

this *intra*district condition of racial isolation. [1] Some other aspects of the Court's remedy, for example, voluntary transfers, either intradistrict or interdistrict, of students from schools where they are in a racial majority to those where they are in a minority, seem unobjectionable.

The Court directs that the boundary between LRSD and PCSSD be adjusted so that all land within the City of Little Rock shall be assigned to LRSD. It also directs the re-transfer of the Granite Mountain area to PCSSD. And, wisely, the Court's opinion leaves it open to any party, on remand, to move the District Court to make different boundary-line adjustments, so long as they have substantially the same impact on the student populations of each district. I concur in the result reached by this portion of the Court's opinion, though for reasons somewhat different from those it gives. In my view, PCSSD's constitutional violations, when considered as a whole, have had some interdistrict effect, and the boundary changes ordered by this Court are a fair approximation of the measures necessary to undo that effect. There is necessarily some imprecision in this reasoning, and it rests as much on inference as on direct evidence, but it is not unfair for the risk of erroneous decisionmaking that this kind of imprecision creates to fall, at least in part, on those who have violated the Constitution. In reaching this conclusion I am heavily influenced by expert testimony that the District Court believed, and that, accordingly, we are also obliged to accept under the clearly-erroneous rule.

1.

The State argues that we cannot require it to spend more money in one school district than another, because to do so would conflict with a recent opinion of the Supreme Court of Arkansas requiring, under the State Constitution, substantially equal per-pupil funding throughout the State, *DuPree v. Alma School Dist. No. 30*, 279 Ark. 340, 651 S.W.2d 90 (1983), and with a statute implementing this opinion, Ark.Stat.Ann. §§ 80-850.10—80-850.22. This argument is insubstantial. Under the Supremacy Clause, U.S. CONST. Art. VI., cl. 2, the Fourteenth Amendment overrides any inconsistent state statute or constitutional provision.

From the remaining features of the Court's remedy, especially its imposition of large financial responsibility on the State of Arkansas for the construction and operation of magnet schools, I respectfully dissent.

II.

One fact stands out after a reading of the District Court's and this Court's opinions: LRSD has more black students than either NLRSD or PCSSD. In the school year 1983-84, LRSD's enrollment of 19,052 was about 69% black and 31% white, Tr. 1448, while PCSSD's enrollment of 27,839 was about 22% black and 78% white, PCSSD X 64, Table 1. LRSD's black percentage has been growing steadily, and one senses that the major impetus behind the District Court's decision to order consolidation is a determination not to permit LRSD to become all black, or virtually so. As a policy matter, I agree that such a result is desirable. An all-black district may have problems raising adequate funds from the property tax, since most voters in the district will still be white, whatever the makeup of the public schools' student body. It is also true that both black and white students benefit, socially and educationally, from exposure to each other.[2] These facts, certainly relevant in a legislative sense, are less directly so in the present judicial context. Our task as judges is not to force these school districts to do what we think is right or socially good, but to apply the law to the facts and announce the result, whatever it may be.

Analysis must start with the governing legal standard laid down by the Supreme Court. It is stated in *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (*Milliken I.*):

2.
The proposition that all-black schools or classrooms are necessarily educationally inferior, however, is quite a different thing, and I do not subscribe to it. The "blacker" LRSD, ironically, appears by all accounts to produce more scholars of note and to offer a broader selection of courses, than the "whiter" districts with which it wishes to merge.

> The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, 402 U.S., at 16 [91 S.Ct. at 1276]. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically, it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of interdistrict segregation. Thus an interdistrict remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an interdistrict remedy would be appropriate to eliminate the interdistrict segregation directly caused by the constitutional violation. Conversely, without an interdistrict violation and interdistrict effect, there is no constitutional wrong calling for an interdistrict remedy.

418 U.S. at 744-45, 94 S.Ct. at 3126-28. The Supreme Court also tells us that no particular degree of racial balance is required by the Constitution, *id.* at 740, 94 S.Ct. at 3125; that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools," *id.* at 741, 94 S.Ct. at 3125; that "[t]he constitutional right of the Negro respondents residing in Detroit is to attend a unitary school system in that district," *id.* at 746, 94 S.Ct. at 3128; and that "[t]he suggestion . . . that schools which have a majority of Negro students are not 'desegregated' . . . finds no support in our prior cases," *id.* at 747 n. 22, 94 S.Ct. at 3128 n. 22.

I also find significant the Supreme Court's summary of the reasoning of the lower courts whose decisions it was reviewing:

> Viewing the record as a whole, it seems clear that the District Court and the Court of Appeals shifted the primary focus from a Detroit remedy to the metropolitan area only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable. Both courts proceeded on an assumption that the Detroit schools could not be truly desegregated—in their view of what constituted desegregation—unless the racial composition of the student body of each school substantially reflected the racial composition of the population of the metropolitan area as a whole.

418 U.S. at 739-40, 94 S.Ct. at 3124-25.

A.

Applying this standard, I look first at the constitutional violations attributed to PCSSD. That such violations have occurred, both before and after the desegregation decree entered against PCSSD in the *Zinnamon* case, I do not doubt. Perhaps most shocking is the fact that current PCSSD board members, far from being familiar with the *Zinnamon* decree, had not even read it when they testified in the District Court. But the question for present purposes must be, what is the *current* interdistrict effect of these violations? See *Goldsboro City Bd. of Educ. v. Wayne County Bd. of Educ.*, 745 F.2d 324, 330-31 (4th Cir. 1984); *Lee v. Lee County Board of Education*, 639 F.2d 1243, 1260 (5th Cir. 1981). Have they caused more white children to come to PCSSD schools, or black children to leave or avoid them, than would otherwise have been the case? If so, to what extent? These questions must be answered, else the remedy will not fit the violation, nor the punishment fit the crime.

1. A great deal of stress is laid upon the fact that, before the *Brown* decision and for a time thereafter, the education provided by PCSSD for black children was grossly inferior to that provided for white children in PCSSD and to that provided for all children, black and

white, in LRSD. As a consequence, some black children came to LRSD to go to school who would not otherwise have been there. But what current effect is this movement, much of which dates from 50 years ago, having? If black students came to LRSD for an education, and then went back home or elsewhere to work and raise their families, obviously their migration would not now be producing any current effect on the racial character of the LRSD student body. It is true that if black parents moved to LRSD and remained there, their descendants might now be attending LRSD schools. The Court appears to have this sort of movement in mind when it says that "[s]ome black families moved from the county to Little Rock because of the disparities in educational opportunities," *ante* at 418, but the record reference cited for this statement, J.D.R. 915-19, in fact contains no support for it.[3] The transfers that did occur appear to be principally of students moving into LRSD, without their parents, to live with a relative. One of LRSD's own witnesses testified, Tr. 116, that this kind of movement of students into LRSD ceased in the 1950's, when state laws requiring school children to be domiciled in the district where they were going to school began to be strictly enforced.[4] In addition, any movement of black families into Little Rock that did occur must have been, to some extent, simply a part of the larger phenomenon of poor people leaving the farm to seek opportunity in the city.

3.

Some white students also transferred to LRSD seeking a "city school education." PCSSD X 51, at p. 62; Tr. 118 (LRSD's witness); PX 36. It was not just black schools in LRSD that were superior. All schools there were regarded as better, and this is hardly sinister or surprising, since Little Rock is the only true urban center in Arkansas and is much richer than many of the other school districts.

4.

The Court seems to agree that significant interdistrict movement of students stopped 20 years ago. *Ante* at 415. And even in the days when it was occurring, it was not simply a matter of black students transferring into LRSD. Between 1953 and 1963 more whites than blacks transferred from PCSSD to LRSD. PX 36. Some of the specific figures are instructive: In 1953-54, 47 black and 223 white children transferred from PCSSD to LRSD; in 1956-57, 42 black and 254 white; and in 1959-60, 34 black and 363 white. (Tr. 133-34 (LRSD's witness).

2. The Court stresses that historically, that is, when PCSSD was first formed, it was the intention of LRSD and PCSSD to expand the boundaries of LRSD *pro tanto* every time the City of Little Rock annexed additional territory, so that the City and LRSD would continue to be coterminous. This intention has not been adhered to: the City has annexed a good deal of territory that has remained within PCSSD and not been transferred to LRSD by "deannexation." But only if PCSSD has declined to transfer territory to LRSD for racial reasons, in order to keep itself "white" and LRSD "black," would this failure to "deannex" justify interdistrict relief. (No one claims that school-district lines were drawn *initially* for racial reasons: back in 1927 when PCSSD was formed, segregation was not thought to be unconstitutional, and no one needed to gerrymander school-district boundaries to preserve it. The claim is, rather, that the PCSSD-LRSD line was *maintained* for racial reasons.)

There have been eight separate transfers of territory from PCSSD to LRSD (and apparently none from LRSD to PCSSD). Of these eight transferred areas, seven have been predominantly white. (Tr. 948-49. This is hardly the action of a school district seeking to maintain its "whiteness." (The exception is the Granite Mountain area, deannexed in 1953, of which I shall speak hereafter.) The Court's point, though, is a bit different: it charges that when it became clear that some real desegregation was going to take place, the boundaries hardened. Dr. Robert A. Dentler, LRSD's principal expert witness, made the same point. "[T]he County I found had decided in its Board of Directors to make a formal policy of no further deannexations in 1968 . . . ." Tr. 343. This new policy, the Court now infers, was based on racial animus, a desire to keep the black percentage in PCSSD down.

In fact, the PCSSD Board voted, on May 14, 1968, (and LRSD now concedes this) in favor of the concept of consolidation with LRSD. Floyd Parsons, Superintendent of LRSD from 1962 to 1971, confirms that during his time in

office PCSSD, the poorer district, consistently sought consolidation. It was LRSD that opposed it, and not for racial reasons, either, but simply because it did not want to take the additional financial responsibility of educating PCSSD's students. Tr. 1131-32 (testimony of Mr. Parsons, called by LRSD).[5] It is true, therefore, that no deannexations have taken place since 1968, but to blame this on PCSSD's desire not to increase its black student percentage is not plausible.

3. In many other respects, however, PCSSD has fallen short of its constitutional obligations, or at least the District Court has not clearly erred in so finding. It cooperated with LRSD and the State in transferring to LRSD the racially segregated Granite Mountain housing project (to be discussed in more detail later). It is imposing upon black students an unfair proportion of the burden of busing for purposes of desegregation, it is not meeting its goals for the hiring of black teachers, it is assigning black students disproportionately to the classification of educably mentally retarded, and it has failed to comply with requirements in the *Zinnamon* decree that a Bi-Racial Committee be established and that two black citizens serve as ex officio members of the school board. And, perhaps most important for present purposes, PCSSD had, in violation of the *Zinnamon* decree, located new schools in white neighborhoods or in places inconvenient to black students, and maintained a number of schools whose racial makeup falls outside the limits specified by the decree. These factors, especially the school-siting decisions, naturally affect the movement of students and families. PCSSD has thus violated not only the *Zinnamon* decree but also the Supreme Court's direction in the *Swann* case, 402 U.S. at 20-21, 91 S.Ct. at 1278-79, that new schools not be located "in the areas of white suburban expansion, farthest from Negro population centers."

5.

Mr. Parsons also testified that he know of no movement of white students from LRSD to PCSSD. Tr. 1142

I believe these factors are having a substantial current interdistrict effect. The record contains expert testimony, and it is not implausible, that these constitutional violations, considered together, are making PCSSD "whiter" and LRSD "blacker" than they otherwise would have been. I have indicated why I do not believe that PCSSD's violations have actually caused any substantial degree of white movement from LRSD to PCSSD, or of black movement out of PCSSD. But another kind of movement—that of families coming from outside the entire Pulaski County area—has, I believe, been substantially influenced. (This sort of movement was referred to by one of the experts as "white overflight.") The pro-white emanations that PCSSD has given off over a period of years, if I may use such a metaphor, have, it seems, been a substantial factor attracting white parents, especially since those parents could, as the lines are now drawn, move into PCSSD without being outside the City of Little Rock. The boundary change ordered by the Court (making LRSD and the City coterminous) would make LRSD 60% black and 40% white, *ante* at 419, instead of 70% black and 30% white. This 10% change seems a fair approximation of what the racial percentages would have been absent the influence of PCSSD's violations. I therefore concur in the Court's decision to adjust the LRSD-PCSSD boundary line to this extent.

B.

The Court holds that the State of Arkansas has committed constitutional violations that are producing substantial interdistrict effects. It therefore awards interdistrict relief against the State, in the person of the State Board of Education. I quite agree that the State of Arkansas has been, in this field, a persistent violator of constitutional rights. I cannot agree that these violations (with one exception) are responsible for the racial disparity now existing between PCSSD and LRSD, or that they justify (again with an exception) interdistrict relief against the State.

1. The Court recounts in detail the manifold sins and omissions of the State of Arkansas in this field. There is no point in denying the history set out in the Court's opinion. In particular, for many years the State, although professing adherence to the "separate but equal" doctrine that was then the law of the land, in fact maintained schools that were separate and unequal, and the black people of the State bore the brunt of this inequality. Furthermore, from 1954 on, the Executive and Legislative Branches of State government set their faces like a flint against the law, covering themselves and the State with dishonor. [6] But what is the present legal relevance of these facts? To the extent that any individual school district (including the three in Pulaski County) is not fully desegregated, the State is at least partly responsible and should pay the price. It has been 31 years since *Brown* was decided, but centuries of inequality are not so soon dissipated. There is no showing whatever, however, and no claim, that the State has caused any school-district boundary lines to be drawn or maintained for racial reasons. Much of the history that the Court details, therefore, is simply irrelevant to the question of interdistrict relief in the present case.

2. The point is made that the State Board of Education is, by statute, given extensive powers, including general supervision over all public schools in the state, Ark.Stat.Ann. § 80-113, and the approval of plans and expenditures of public-school funds for new school buildings, Ark.Stat.Ann. §§ 80-113, 80-3506. These statutes have never been interpreted to give the State Board of Education the sort of wideranging supervisory power this Court attributes to it. Instead, local school boards, except for certain legal and financial aspects of their operations,

---

6.

On the other hand, the whole picture, fairly considered, is not so gloomy as the Court implies. Plaintiff's own expert witness on the history of school desegregation in Pulaski County testified that "Little Rock a few years after 1959 was far more integrated . . . than many cities in the North where I grew up." Tr. 103.

have been almost completely autonomous. See Ark.Stat.Ann. § 80-509, listing in comprehensive detail the powers of local boards. Decisions, for example, as to where to locate schools have always been treated as the prerogative of local boards. They have chosen the sites. Tr. 776, and the State Board of Education has never claimed the authority to overrule a district's decision on where to build a school, Tr. 788. Rather, the statement in § 80-113 that the State Board shall "approve plans and expenditures of public school funds for all new school buildings" has been interpreted to authorize the State Board to review local decisions only to make sure that plans meet recognized construction standards and that proposed methods of financing are legally and fiscally sound under the statutes of the State limiting school districts' bonded debt. Tr. 775. Both the State Board and local school districts have so construed the statute at least since 1931. There is no evidence that the State Board has ever purported to review school-siting decisions, either for desegregation or for any other purposes. It is therefore unfair to blame the State for PCSSD's violations of the siting provisions of the *Zinnamon* decree.

It is true, as the Court says, that the State Board of Education's efforts to assist and encourage desegregation have been too little and too late (though I suspect that it is entitled to somewhat more credit than the Court gives it). [7] But again, what is the relevance of this fact to the specific interdistrict relief contended for in the present case? If the

---

7.

In 1966, for example, the State Board did create a specific position to work with local boards in the desegregation process. This position was paid for out of the State's own funds, not federal funds. Tr. 784-785. The State did not apply for federal desegregation funds. Instead, the Arkansas Technical Assistance Center, a private organization sponsored by Ouachita Baptist University, applied for and received Title V federal funds to assist school districts in desegregating. "The decision was made . . . that those funds could be expended probably more efficiently if it were in any agency . . . that was not subject to politics and pressures."; Tr. 804. The State Board of Education "cooperated very closely with the Center at Ouachita." Tr. 805.

State Board of Education had diligently fulfilled its duty to encourage desegregation, would the boundary line between LRSD and PCSSD be located in a different place from where it now is? Would the racial distribution of students between those two districts be different from what it now is? I do not believe that the record supports any definite answer to these questions. I repeat that the State's defaults would fully justify compelling it to participate in an *intra*district remedy. But that is not what this case, at least primarily, is about.

3. There are certain specific respects, however, in which the State of Arkansas, with a racially discriminatory motive, actually assisted in the movement of school children across district lines. During the school year 1958-59, the schools in LRSD were closed, and many children from Little Rock attended segregated schools in PCSSD. The State paid at least part of the cost of these transfers, and I am willing to assume that many more white students than black benefited from this action. Shameful as it was, I cannot see that this episode has any continuing, current effect on the distribution of students as between LRSD and PCSSD. The LRSD schools reopened in the fall of 1959, and there is no evidence that students who attended school elsewhere in 1958-59 did not return to LRSD when they could. I would, however, on the basis of this history, agree that the State should pay for any voluntary majority-to-minority transfers between PCSSD and LRSD. That would be a fair recompense for what it did in the late fifties.

The Court suggests that the racial turmoil created by the State in LRSD in 1957 and the years immediately following has increased the percentage of black students in the district. It says, for example, that "the active intervention of the state was a central factor in delaying desegregation of the Little Rock schools until 1973, and in contributing to the increasing concentration of blacks in LRSD." *Ante* at 417. With the first part of this statement I can agree completely, but the second part seems to me a *non*

sequitur. The idea that "state-created racial turmoil in LRSD in the 1950's festered substantial white flight from LRSD to PCSSD and NLRSD," *ante* at 417, n. 8, seems completely counterintuitive. It would be much more plausible to infer that the State's efforts to maintain segregation in LRSD made it more likely for whites, once the schools had been reopened, to remain there. Even were it correct that pro-segregation turmoil of the late 1950's somehow fostered white flight, this phenomenon ended long before the 1973 implementation of desegregation and could at most account for the increase in the percentage of black students to 48%, which was the black percentage in LRSD in 1973. See *Clark v. Board of Educ. of the Little Rock School District*, 705 F.2d 265, 267 (8th Cir. 1983).

4. In one other respect, however, I believe the Court properly attributes interdistrict liability to the State. Housing authorities are creatures of the State, existing by virtue of statute, and the Little Rock Housing Authority clearly maintained and fostered racial segregation. In some cases, it might be unfair to award interdistrict relief against school districts on the basis of housing violations. A "school case, like a vehicle, can carry only a limited amount of baggage. *Swann* 402 U.S. at 24 [91 S.Ct. at 1280]." *Bradley v. School Board of the City of Richmond, Virginia*, 462 F.2d 1058, 1066 (4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973). But here, PCSSD, LRSD, and the State legislature all cooperated with the Little Rock Housing Authority in respect of the Granite Mountain Housing Project, a segregated black project constructed in 1953. At that time, territory in which the housing project was to be located was transferred by a special act of the General Assembly from PCSSD to LRSD. The school districts and the State were thus directly involved in a transfer of territory on which a segregated housing project was to be built, a fact that they must have known.

This was a clear interdistrict violation, and an appropriate remedy should be devised to cure it. The Court, *ante* at 435, directs that the Granite Mountain area be retransferred to PCSSD, and leaves to the District Court on remand to determine "the precise boundaries of . . . the area that was impacted by the 1953 deannexation of land from PCSSD to LRSD." *Ibid.* I agree that this remedy, or some substantial equivalent to be selected by the District Court, see *ibid*, is appropriate.

III.

In sum, this Court properly affirms, as not clearly erroneous, the District Court's findings of intradistrict violations on the part of PCSSD. These violations, as well as those committed by NLRSD, should be corrected. In the main intradistrict relief, in which the State Board of Education should be made to share, should be adequate for this purpose. I also believe that an interdistrict violation by PCSSD, LRSD, and the State has been made out in respect of the location of the Granite Mountain Housing Project, and that PCSSD's other violations justify the boundary change ordered by the Court. As to the State Board of Education, however, I would not grant any interdistrict relief, except with respect to the funding of voluntary student transfers and the retransfer of the Granite Mountain area. From the extensive additional relief granted against the State, and from the remaining remedial details ordered by this Court, I respectfully dissent.

JOHN R. GIBSON, Circuit Judge concurring in part and dissenting in part, joined by FAGG, Circuit Judge.

Although I agree with much of what the court does today, I do not believe there is sufficient evidence in the record to support that part of the court's decision requiring that the boundary lines of the City of Little Rock and the LRSD be made coterminous. Therefore, I respectfully dissent. Furthermore, while I agree with nearly all of Judge

Arnold's persuasive discussion and reasoning, I believe that his opinion likewise fails to demonstrate that there has been sufficient proof of significant interdistrict segregative effects to justify realigning the boundaries of the LRSD and the City of Little Rock.

The record makes plain, and I fully concur in the court's conclusion, that there have been substantial and in fact egregious intradistrict constitutional violations as a result of segregative acts on the part of the NLRSD and the PCSSD, the effects of which must be remedied. I also agree with the court's conclusion that the record does not reveal sufficient interdistrict segregative effects to justify consolidation of the three districts.

I further agree with the court today that the Granite Mountain transfer, which occurred in 1953, had an interdistrict segregative effect. However, I believe that the current effects of this violation are not clearly delineated either in the district court's findings of fact and conclusions of law, or in this court's conclusions today. Contrary to the court's decision today, as well as Judge Arnold's views, I believe that this issue should be remanded to the district court for more precise and specific findings as to the current interdistrict segregative effect of the 1953 transfer, and for consideration of an appropriate remedy tailored to the constitutional violation that is found to exist.

My chief concern with the opinion of the court is that it reads too broadly the principles which govern the federal equitable remedial power in *Milliken v. Bradley*, 418 U.S. 717, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (*Milliken I*). Judge Arnold, while recognizing these principles and cogently pointing out the manner in which the court misapplied them, improperly relies upon his own factual conclusions based on an overly generous interpretation of the record to justify the remedy ordered today.

Milliken I established that an interdistrict remedy is appropriate only upon a showing of "a constitutional

violation within one district that produces a significant segregative effect in another district;" specifically, that "racially discriminatory acts * * * have been a substantial cause of interdistrict segregation." *Id.* at 744-45, 94 S.Ct. at 3127. Further, an interdistrict remedy is appropriate only "to eliminate the interdistrict segregation *directly* caused by the constitutional violation." *Id.* at 745, 94 S.Ct. at 3127 (emphasis added). Two courts of appeals have read this language to require clear proof of cause and effect to a constitutional violation and a careful delineation of the extent of the effect before an interdistrict remedy may be involved. In *Lee v. Lee County Board of Education*, 639 F.2d 1243, 1256 (5th Cir. 1981), the court stated:

> We believe the Court's deliberate choice of phrases such as "substantial" or "direct cause" and "significant segregative effect" also expresses an insistence that in cases where an interdistrict remedy is requested, there must be clear proof of cause and effect and a careful delineation of the extent of the effect. In the absence of such a showing, school district lines are to be carefully observed and desegregation remedies confined to orders affecting the school district in which the condition of segregation is manifest.

Accord Goldsboro City Board of Education v. Wayne County Board of Education, 745 F.2d 324, 332 (4th Cir. 1984).

The Fifth Circuit also emphasized in *Lee* that there must be "a substantial, direct and *current* segregative effect," 639 F.2d at 1260 (emphasis in original), before an interdistrict remedy may be ordered. This argument is persuasive, for a remedy cannot be tailored to correct a condition, *Milliken I*, 418 U.S. at 738, 94 S.Ct. at 3124, unless it currently offends the Constitution. As the court stated in *Milliken I*: "A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.' " *Id.* at 738, 94 S.Ct. at 3124 (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402

U.S. 1, 16, 91 S.Ct. 1267, 1276, 28 L.Ed.2d 554 (1971). The Court reemphasized this important limitation on the federal remedial power in *General Building Contractors v. Pennsylvania*, 458 U.S. 375, 399, 102 S.Ct. 3141, 3154, 73 L.Ed.2d 835 (1982), in which it cautioned that a remedial decree should "extend no farther than required by the nature and the extent of that violation."

It is also well to observe before we turn to specific issues that the court today adopts its own remedy, which has not been addressed by the parties in their arguments or briefs, and which differs substantially from that ordered by the district court. The findings of fact necessary to support this court's remedy simply do not exist. Specifically, there is no finding by the district court of a current segregative effect to support the conclusion that the boundaries of the City of Little Rock and LRSD be made coterminous.

The court, to support that portion of its discussion mandating that the boundary of the City of Little Rock and the LRSD be coterminous, simply catalogs a portion of the district court's findings in a footnote. *See ante* at 435 n. 20. It must be observed, however, that the court, at least with respect to the district court's findings on student assignments, special education, transportation, and employment of faculty and administrators, simply has enumerated intradistrict violations that may require intradistrict remedies within the PCSSD. Neither this court's nor the district court's opinion indicates in any way that these *intra* district violations manifested an *inter* district effect.

Similarly, neither the opinion of this court nor the record from the district court reveals the conduct of the PCSSD which has resulted in the lack of low income housing in the PCSSD. The only exception with respect to public housing is the evidence concerning the Granite Mountain deannexation in 1953 and the role that the PCSSD may have played at that time.

The court also relies on violations relating to school sitings to justify an interdistrict remedy. These violations which are discussed at some detail in the court's opinion involve decisions by the PCSSD to build some twelve schools away from the centers of black population. This, it is argued, served to attract whites to the outlying areas, resulting in a number of schools with over 90% white enrollment. This is a weak foundation for the remedy the court today orders. Adjusting the boundaries of the PCSSD and the LRSD so that the latter are coterminous with Little Rock city limits will not affect the twelve schools in question, which are located far from the city limits. There simply is no indication in the record that the suspect school sitings had any impact on the schools within the Little Rock city limits that, as a result of the court's decision today, will now be turned over to the LRSD.

Judge Arnold's opinion treats in detail what interdistrict effects might result from the history of annexations and deannexations. The district court's order stressed the freezing of the boundaries. The court today emphasizes testimony that "the boundaries harden[ed]," *ante* at 419, and were "maintained to keep the LRSD predominantly black and the PCSSD predominantly white," and concludes that these manipulations had a substantial interdistrict segregative effect. Admittedly there was expert testimony to support this conclusion. The court relies heavily on Dr. Dentler's testimony that beginning in 1968 the board of PCSSD refused to modify its boundaries. *Ante* at 420. To the contrary, the United States argued that PCSSD has not refused a single deannexation petition since it allegedly froze its boundaries. In its brief, LRSD attempts to refute this argument and support the theory that the PCSSD intentionally froze its boundaries:

> The record reveals, however, on 4/13/65 the PCSSD notified the adjacent Bryant and Cabot school districts that it would not accept any more black students. PX 10. The minutes further reveal the county refused to

> meet with LRSD officials to discuss consolidation on 5/14/68, and refused NLRSD's attempt to annex the Spring Hill area on 4/8/69. Further, informal efforts of the LRSD to discuss cooperative interdistrict agreements failed.

Brief for Appellee at 56.

After argument, this court specifically inquired as to the record support for these statements. LRSD answered that the first sentence had no record support. As to the second sentence, it answered that the PCSSD board had, on May 14, 1968, voted in favor of the consolidation with LRSD. [1] On this critical point, therefore, LRSD simply was forced to admit that its argument had collapsed. This collapse not only removes the factual underpinnings from Dr. Dentler's opinion, but makes it directly contrary to the evidence. Judge Arnold is correct in his conclusion that "it is true * * * that no deannexations have taken place since 1968, but to blame this on PCSSD's desire not to increase its black student percentage is not plausible." *Ante* at 440. On the record before us, I can only conclude that the district court's finding that the PCSSD intentionally "froze" or "hardened" its boundaries, which the court today accepts, is contrary to the evidence, and thus is clearly erroneous.

The only other support for the court's order today is "the pre- and post-*Brown* interdistrict transfers and the other historical violations with continuing effect." *Ante* at 435 n. 20. Absent a more specific demonstration of the continuing effects of historical violations, *see ante* at 436 (Arnold, J., concurring and dissenting), I believe that this evidentiary foundation, as well as the entire stated basis for the court's remedy, fails to meet the standards of *Milliken I* and the clarifying interpretation of those standards in *Lee* and *Goldsboro*.

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1. The informal efforts referred to in the last sentence occurred in a later period, shortly before the filing of this action.

To Judge Arnold's credit, he squarely faces the weaknesses of the court's opinion. His further observations on the support for making the boundaries of LRSD and the City of Little Rock coterminous deserve further comment.

From the decisions of the PCSSD locating schools in areas of white suburban expansion farthest from black population centers, Judge Arnold argues "I believe these factors are having a substantial current interdistrict effect." *Ante* at 441. He argues that the movement of families from outside the entire Pulaski County area to areas within the City of Little Rock also within the PCSSD has been substantially influenced by the unconstitutional siting decisions, causing a phenomenon labeled "white overflight." It must be observed that Judge Arnold does not point to any "substantial evidence" proving this "significant segregative effect," *Milliken I*, 418 U.S. at 744-45, 94 S.Ct. at 3127, or as expressed in *Lee*, "clear proof of cause and effect and a careful delineation of the extent of the effect." 639 F.2d at 1256. Rather, he relies upon belief. Such beliefs do not, within the limitations of our judicial power, serve as an appropriate consideration in reviewing the order before us. Judge Arnold makes no effort to determine whether there are findings of the district court which support these conclusions. There simply are none. The imprecise nature of his conclusions and his departure from the principles of *Milliken*, are best evidenced by his conclusion that the ten percent change in racial makeup which results from realigning the LRSD's boundaries "seems a fair approximation of what the racial percentages would have been absent the influence of PCSSD's violations." *Ante* at 441. Thus, his vigorous effort to support the court's conclusion ultimately rests on speculation, belief, and fair approximation, and not upon the principles of *Milliken I* which must guide us.

Judge Arnold's final observation conclusively demonstrates the tenuous nature of his conclusion. He points to "pro-white emanations" that PCSSD has given off

over a period of years as a factor which has attracted white parents into the PCSSD areas within the City of Little Rock. There is no indication as to the record source of these emanations. I have substantial question whether such subjectively perceived emanations are sufficiently palpable to make the showing required by *Milliken I* or to constitute the clear proof of cause and effect which *Lee* and *Goldsboro* correctly hold to be necessary.

Judge Arnold's particular approach to these issues must rely upon his own findings. This is contrary to the Supreme Court's teaching in *Anderson v. City of Bessemer City*, ____ U.S. ____, 105 S.Ct. 1504, 1510-11, 84 L.Ed.2d 518 (1985), that the trial judge must play the principal role in the determination of facts.

A final observation is in order. The court stretches mightily to find a basis for making the boundaries of the City of Little Rock and the LRSD coterminous. This result will make the LRSD 60 percent black and 40 percent white. However, one most significant factor has been omitted from this equation. In 1980 there were 3,632 white students enrolled in private schools located in the LRSD, 2,794 white students enrolled in private schools in PCSSD, and 1,086 white students enrolled in private schools in the NLRSD. In the LRSD alone, if the white students in private schools attended public schools, the district would be approximately 52 percent rather than 69 percent black. Another significant factor which is not taken into account is that the number of white students in private schools in LRSD increased by more than 1,000 between 1970 and 1980 and the number of white students in private schools in PCSSD increased by more than 1,700 during the same time period. It is evident from the sharp increase in enrollment in private schools in these ten years, and the impact of these numbers on the total student population, that private choice is having a far greater segregative effect than those factors

the court points to in its opinion today.[2] This is a factor, however, that at present, and in all likelihood in the future, will pose a significant impediment to any effort to achieve desegregation within any of the three school districts.

One of the great failings of the court's opinion, as well as that of the district court order, is the failure to address in other than a most speculative way demographic factors, such as population movement and birth rate, common to major metropolitan centers, that have significant impact on the school problems in this and other communities. *Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 436, 96 S.Ct. 2697, 2704, 49 L.Ed.2d 599 (1976); *see also Bradley v. School Board of City of Richmond*, 462 F.2d 1058, 1066 (4th Cir. 1972), *aff'd mem. by an equally divided court*, 412 U.S. 92, 93 S.Ct. 1952, 36 L.Ed.2d 771 (1973).

I would remand the case to the district court only for further consideration of appropriate relief for intradistrict constitutional violations and for further consideration of the current segregative effect resulting from the Granite Mountain deannexation and for consideration of an appropriate remedy tailored to correct any such violation.

2.

The private school problem seems to be an untouchable issue that none of the parties has evidenced any interest in addressing. It may well be that a substantial portion of the enrollment is in religious and parochial schools. From figures furnished to the court by the parties based upon publications of the state of Arkansas, however, there are nearly 3,000 students in the Little Rock area who attend private schools seemingly having no religious affiliation. There simply is no record before us to determine whether some of this enrollment is pretext for avoiding the impact of desegregation or springs from other motives. We do observe, however, that racial discrimination in private schools, including those with a religious affiliation, is deeply contrary to public policy, *Bob Jones University v. United States*, 461 U.S. 574, 595 & n. 32, 103 S.Ct. 2017, 76 L.Ed.2d 157 (1983), and that schools which are shown to employ discriminatory practices will be barred from enjoying the governmental privileges accorded their nondiscriminatory counterparts. *Id.* at 595-96, 103 S.Ct. at 2030-31.

BOWMAN, Circuit Judge, concurring in part and dissenting in part.

I agree with the views expressed in the separate opinion of Judge John R. Gibson, with two reservations.

First, I do not agree that the Granite Mountain transfer provides a proper basis for an interdistrict remedy. This transfer occurred in 1953, when all public facilities in Arkansas, public schools and public housing alike, still were operating, with the laws' blessing, on a segregated basis. The black children living at that time in the Granite Mountain housing project would have gone to all-black schools no matter which district those schools happened to be in. Because it seems clear that the maintenance of segregated education was not the motive for this transfer, I would not treat it as a predicate for interdistrict relief.

Second, I do not agree with the thrust of footnote 2 of Judge Gibson's opinion, *ante* at 447. Specifically, I do not agree that lawfully operated private schools are an "issue" that any of the parties to this lawsuit should have an interest in addressing. Parents choose their children's schools for many different reasons. Sometimes the reasons are admirable, sometimes not. So long as this remains a free country, however, the motives of individual parents in opting to send their children to private school rather than public school will remain none of the law's concern.

(3)

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No. 87-2085

In The
Supreme Court of the United States
October Term, 1987

ARKANSAS STATE BOARD OF EDUCATION, *ET AL.*,
Petitioners,

V.

LITTLE ROCK SCHOOL DISTRICT, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

WHETHER THE COURT OF APPEALS CORRECTLY DIRECTED THE STATE TO FUND PART OF A LOCAL SCHOOL DISTRICT'S DESEGREGATION REMEDY WHEN THE STATE WAS ORIGINALLY FOUND TO BE A CONSTITUTIONAL VIOLATOR.

II

WHETHER THE EIGHTH CIRCUIT CORRECTLY REQUIRED THE STATE TO FUND VARIOUS COMPENSATORY AND REMEDIAL EDUCATION PROGRAMS FOR THE LITTLE ROCK SCHOOL DISTRICT.

III

WHETHER THE EIGHTH CIRCUIT'S IMPOSITION OF FUNDING REMEDIAL AND COMPENSATORY EDUCATION PROGRAMS UPON THE STATE IS A REASONABLE REMEDY CONSISTENT WITH THE SCOPE OF THE STATE'S CONSTITUTIONAL VIOLATION.

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REASONS FOR DENYING THE WRIT

The State asserts that the Eighth Circuit's directive to it is merely to pay money. This overlooks the initial district court and Court of Appeals' findings that the State was a primary constitutional wrongdoer with desegregative obligations both financial and otherwise. *Little Rock School Dist. v. Pulaski County Special School Dist.*, 778 F.2d 404, 411-17, 423, 426, 433, 436 (8th Cir. 1985).

The Court of Appeals' decision does not conflict with the recent Sixth Circuit decision in *Kelley v. Board of Ed. of Nashville and Davidson County*, 836 F.2d 986 (6th Cir. 1987). There the state was brought in by a third party action after liability had been assessed against the county. Here the State was an initial party found by the court to have contributed to segregation. Pursuant to *Milliken v. Bradley*, 433 U.S. 267 (1977), the State of Arkansas was required to spend money ancillary to its obligation to end segregation. There is no conflict among the circuits by the Eighth Circuit's decision here and *Kelley*.

Nor is there a conflict on the issue of the local district's ability to pay the costs of desegregation. The distinction, again, is that the State here is a constitutional violator. In *Kelley*, the State of Tennessee was added merely to obtain benefit of its "deep pocket". No liability determination was made against the State of Tennessee in *Kelley*.

Moreover, a segregation victim's (Little Rock School District) ability to pay for its own remediation is not relevant. It is the responsibility of the constitutional violator to pay the costs of remedying its segregative wrongs.

The State correctly points out that the nature of a desegregation remedy is determined by the nature of the constitutional violation, citing *Milliken,* 433 U.S. at 280, and *Swann v. Charlotte-Mecklenburg Board of Ed.,* 402 U.S. 1, 16 (1971). The Eighth Circuit's requirement that the state pay for compensatory and remedial education programs is consistent with the State's constitutional violation. The violation has not been cured, hence the State's obligation continues. The Eighth Circuit has not departed from the law of the case and there is no call for an exercise of this Court's supervisory power.

CONCLUSION

The Eighth Circuit's decision presents no conflict among the circuits in school desegregation cases. Nor does this case possess any important issues justifying this Court's consideration. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LITTLE ROCK SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO CERTIORARI

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No. 87-2085

In The
Supreme Court of the United States
October Term, 1987

ARKANSAS STATE BOARD OF EDUCATION, ET AL.,
Petitioners,

v.

LITTLE ROCK SCHOOL DISTRICT, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

LITTLE ROCK SCHOOL DISTRICT'S BRIEF IN OPPOSITION TO CERTIORARI

REASONS FOR DENYING THE WRIT

I.

There Is No Conflict Among the Circuits Which Warrants Review By This Court

The decision of the Eighth Circuit Court of Appeals in this case can be reconciled with the decision of the Sixth

Circuit Court of Appeals in *Kelley v. Metropolitan County Board of Education,* 836 F.2d 986 (6th Cir. 1987), *cert. denied,* 56 U.S.L.W. 3864 (June 20, 1988). Given the facts which were presented to the Eighth Circuit Court of Appeals in this case, the Sixth Circuit panel which decided *Kelley* might well have rendered a decision very much like the decision below. The critical factual differences between this case and *Kelley* resulted in decisions which are different, but not in conflict "on the same matter". Supreme Court Rule 17.1.

The Arkansas State Board of Education (State Board) was an original defendant in this case. Petition, p. 4; *Little Rock School District v. Pulaski County Special School District,* 778 F.2d 404, 408 (8th Cir. 1985). In contrast, the State of Tennessee was sued in *Kelley* "some 26 years after the start of the lawsuit". *Kelley,* 836 F.2d at 987.

The State Board was determined to be a necessary party to this case (*Little Rock School District v. Pulaski County Special School District,* 584 F. Supp. 328, 353 (E.D. Ark. 1984); *Little Rock School District v. Pulaski County Special School District,* 597 F. Supp. 1220, 1227-28 (E.D. Ark. 1984)) and did not appeal that determination (*Little Rock School District v. Pulaski County Special School District,* 778 F.2d 404, 407-09 (8th Cir. 1985)). The State of Tennessee, on the other hand, immediately asserted the defense of sovereign immunity. *Kelley,* 836 F.2d at 988. If the defense of sovereign immunity had not been raised during the liability phase in *Kelley,* as it was not raised by the State Board during the liability phase of this case, the result in *Kelley* probably would have been different. In cases where the defense of sovereign immunity was not

raised, the Sixth Circuit has affirmed "judgments ordering state defendants to share in the payment of school integration costs." *Id.* at 995 n. 4.

Little Rock School District students remain active parties in this case and further hearings will be held to determine the full scope of the required remedy for those students. *Little Rock School District v. Pulaski County Special School District,* 839 F.2d 1296, 1308 (8th Cir. 1988). The situation was quite different in *Kelley:*

> It bears emphasis that we are not here called upon to adjudicate the rights of plaintiff's suing to obtain the equal educational opportunities promised them in *Brown v. Board of Education.* Those plaintiffs have long since won their case. They won it without ever having asserted a claim against the state. They are already receiving—through decrees that do no violence to the principle of sovereign immunity—the full measure of relief to which they are entitled under the Constitution.

836 F.2d at 989-90 (citation omitted).

Three separate parties to this case contend that the State Board must participate in the remedy required by the Eighth Circuit. Those parties are: Black LRSD students represented by the Joshua intervenors; LRSD teachers represented by the Knight intervenors; and LRSD itself. The *Kelley* case was decided on the basis of a belated claim brought "solely in its own right" by a political subdivision which had been "an active participant in the same wrongs on which it base[d] its claim for indemnification". *Kelley,* 836 F.2d at 998.

This case, unlike *Kelley,* is not just about money. The district court's remedial order in this case plainly said

that the State Board would have "financial and oversight responsibilities". *Little Rock School District v. Pulaski County Special School District*, 597 F. Supp. 1220, 1228 (E.D. Ark. 1984). The Eighth Circuit Court of Appeals has held that the State Board must "participate in funding the compensatory, remedial and quality education programs, in establishing and maintaining the magnet schools, and in monitoring plan progress".

The State Board's responsibility to establish, maintain, monitor and oversee portions of LRSD's desegregation plan clearly distinguishes this case from *Kelley*. Tennessee was joined in *Kelley* "solely to permit one sometime constitutional wrongdoer to recover monetary compensation from another". *Kelley*, 836 F.2d at 990.

The district court has vividly described the notorious actions taken by the State of Arkansas to oppose all efforts to desegregate the Little Rock schools. *Little Rock School District v. Pulaski County Special School District*, 584 F. Supp. 328, 330-34 (E.D. Ark. 1984). The Court of Appeals affirmed those findings and said:

> [A]lthough the Little Rock Board of Education announced shortly after *Brown I* that it would begin to desegregate its schools by 1957 and complete the process by 1963, the active intervention of the state was a central factor in delaying desegregation of Little Rock schools until 1973, and in contributing to the increasing concentration of blacks in LRSD. The district court found that throughout this period and to this day, the state has never acknowledged its affirmative duty to assist local school districts in their desegregation efforts and has never promulated any rules or guidelines which would encourage the local school districts to eliminate discrimination in their school systems. Nor has it taken any action to foster racially neutral school siting. Rather, it has approved

> racially segregative school sitings in violation of district court decrees as recently as 1980.
>
> * * *
>
> To this day, the state takes the position that Arkansas law does not permit it to assist local school boards in their desegregation efforts.

778 F. Supp. at 417. These findings were made during the liability phase of this case and are no longer subject to review.

The district court finding in *Kelley* that Tennessee was a constitutional wrongdoer was reviewed by the Sixth Circuit. *Kelley*, 836 F.2d at 993. The Sixth Circuit panel "searched the record in vain for any demonstration that integration of metropolitan Nashville's schools has been wrongfully impeded by anything the state has done, or has failed to do, in the 1970s or 1980s." *Id.* While the State of Arkansas has not yet discharged its affirmative duty to effectuate a transition to a racially non-discriminatory school system, Tennessee's "duty in this respect was discharged long before Metro filed its third-party complaint" in *Kelley*. *Id.* at 994.

Because of the factual differences between this case and *Kelley*, the Eighth Circuit is not in conflict with the Sixth Circuit. The facts of this case bring it clearly within the rationale of *Milliken v. Bradley*, 433 U.S. 267 (1987) (*Milliken II*) while the facts of *Kelley* leave it well outside the scope of *Milliken II*.

The Eleventh Amendment does not prohibit a federal court order enjoining state officials "to conform their conduct to requirements of federal law, notwithstanding a direct and substantial impact on the state treasury." *Mil-*

liken II, 433 U.S. at 289, citing *Edelman v. Jordan*, 415 U.S. 651, 667 (1974). The Eighth Circuit order at issue here simply requires state officials who have been held responsible for unconstitutional conduct to participate in the funding and oversight of compensatory educational programs as part of a desegregation plan which will operate prospectively to bring about the delayed benefits of a unitary school system. That order is clearly appropriate under *Milliken II*. 433 U.S. at 289-90.

The Sixth Circuit in *Kelley* also employed a *Milliken II* analysis, but the Sixth Circuit's analysis was focused on facts which are distinct from those in this case and which required a different result. While Arkansas was guilty of recent and current constitutional violations, Tennessee's constitutional obligations had long been discharged. While Arkansas was an original defendant in this case, Tennessee was sued in *Kelley* as a third-party defendant long after liability had been determined. While Arkansas was required to participate prospectively in the funding and oversight of programs designed to bring about the benefits of a unitary school system in Little Rock, students in Nashville were already receiving the full measure of relief to which they are entitled under the Constitution. While students and teachers remain active litigants in this case seeking relief from the State Board, Tennessee was sued solely by its political subdivision. Most importantly, however, Arkansas has been required to participate in the establishment, funding, monitoring and oversight of the Little Rock School District's desegregation plan, and has even been allotted two representatives on the Magnet Review Committee which controls interdistrict magnet schools located in Little Rock (*Little*

Rock School District v. Pulaski County Special School District, 778 F.2d 404, 436), while the district court order challenged by Tennessee required nothing more than the payment of money.

The Eighth Circuit Court of Appeals in this case and the Sixth Circuit Court of Appeals in *Kelley* both recognized that *Milliken II* controls the determination of whether a state defendant should be required to participate in a school desegregation remedy. The results reached by the two circuits are different because of the very critical factual differences. The decisions are not conflicting.

II.

The State Board's Argument That State Constitutional Violators Cannot Be Ordered To Participate In A Desegregation Remedy Unless The Local School District Is Unable To Fund The Remedy Is Both Improper And Incorrect

The State Board contends that there is a conflict between the Sixth and Eighth Circuits "as to whether a state may be required to fund a local desegregation plan without a predicate showing that the local school board is incapable of funding the entire program". The State Board did not raise this issue in the Court of Appeals. This Court ordinarily does not decide questions not raised or resolved in the lower court. *Youakim v. Miller*, 425 U.S. 231, 234 (1976). The question is therefore not properly raised by the Petition. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

The Sixth Circuit in *Kelley* did not require a determination that a local school district is unable to fund its desegregation plan as a predicate to state liability. That Court merely observed that *Kelley* was not a case in which

desegregation would be delayed or diminished if the state were not ordered to participate in the remedy. *Kelley*, 836 F.2d at 990. The purpose of that observation was to show that the contest between the parties was "a contest not about desegregation, but about money". *Id.*

There can be no conflict between the Sixth and Eighth Circuits on this issue because the Sixth Circuit's discussion of the issue is dicta and the Eighth Circuit has not yet had the opportunity to decide the issue. The decision below properly adheres to the well-settled principle that "the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation." *Milliken II*, 433 U.S. at 280; *see Little Rock School District v. Pulaski County Special School District*, 778 F.2d 404, 433 (8th Cir. 1985).

III.

The Court Of Appeals Clarified But Did Not Improperly Expand The Remedy Against The State Board

The Court of Appeals held in 1985 that the constitutional violations found to have occurred in three Pulaski County, Arkansas school districts could be remedied by less intrusive means than countywide consolidation. *Little Rock School District v. Pulaski County Special School District*, 778 F.2d at 408. Those means included "improving the quality of any remaining nonintegrated schools in LRSD, providing compensatory and remedial programs for black children in all three school districts, . . . and requiring the State Board to participate in funding the compensatory, remedial and quality education programs,

in establishing and maintaining the magnet schools, and in monitoring plan progress." *Id.*

The Court of Appeals was aware that four particular schools were then racially identifiable and might remain so the following school year. It therefore ordered that certain state funded remedies be provided in those schools if they retained their racial identifiability. *Id.* at 485. The Court of Appeals did not say that the required state participation in funding compensatory, remedial and quality education programs would be limited to four schools or that the requirement would dissolve if those particular four schools were fully integrated.

The order now challenged by the State Board is merely a clarification of the 1985 order. The clarification was necessary because LRSD adopted a different student assignment plan as a part of its ongoing desegregation effort (*Little Rock School District v. Pulaski County Special School District*, 839 F.2d at 1306) and because the district court placed an overly restrictive interpretation on the 1985 decision (*Little Rock School District v. Pulaski County Special School District*, 659 F. Supp. at 366). The clarification is straightforward and simple:

> In using the phrase "all- or nearly all-black", it was our intention to provide comprehensive, remedial and compensatory programs in racially identifiable black elementary schools.

Id. This clarification neither misapprehends nor conflicts with the 1985 ruling "requiring the State Board to participate in funding the compensatory, remedial and quality education programs". *Little Rock School District*, 778 F.2d at 408.

The State Board nevertheless sought *en banc* rehearing by the Court of Appeals. Rehearing was denied without dissent. Petition, p. A-1. This is an indication that the judges who joined the majority opinion of the *en banc* court in 1985 intended the meaning reflected in the 1988 panel decision.

The State Board contends that the Court of Appeals should have deferred to the district court "with regard to the liability of the State" and employed a "clearly erroneous" standard of review. The "clearly erroneous" standard is applicable to questions of fact, not to questions of law. *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982). The state liability question was not only a question of law, it was a question of law that had been decided by the Court of Appeals and remanded to the district court for action consistent with that decision. The district court was not free to enter an order inconsistent with the Court of Appeals' determination of the law. The clarification by the Court of Appeals was consistent with its previous opinion and not so great a departure from the accepted and usual course of judicial proceedings as to warrant review by this Court.

———o———

CONCLUSION

For the foregoing reasons, Respondent Little Rock School District respectfully prays that the writ be denied.

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No. 87-2085

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OCTOBER TERM, 1988

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LITTLE ROCK SCHOOL DISTRICT, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOSHUA RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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JOSHUA RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

REASONS FOR DENYING THE WRIT

I

There Is No Conflict Among The Circuits That Warrants Review By This Court

Petitioners suggest that this Court should grant review of the decision below because there is a significant conflict among the Courts of Appeals with respect

to the application of the Eleventh Amendment in school desegregation actions. According to Petitioners, the Sixth Circuit in Kelley v. Metropolitan County Board of Education, 836 F.2d 986 (6th Cir. 1987), cert. denied, 56 U.S.L.W. 3864 (U.S. June 20, 1988), held, contrary to the court below, that the Eleventh Amendment bars a federal court from requiring state agencies that committed Fourteenth Amendment violations to participate in remedying the effects of those violations -- including by helping to fund appropriate remedial and compensatory educational programs for the victims of unlawful segregation.[1]

In Kelley, many years after a desegregation remedy was implemented, the school district filed a third-party

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[1]This Court specifically approved such remedies in Milliken v. Bradley, 433 U.S. 267 (1977).

complaint against state authorities (who had not previously been joined as parties in the lawsuit), seeking reimbursement of its prior remedial expenditures and contribution toward the continuing costs of the remedy. Although the district court granted the prospective relief, 615 F. Supp. 1139 (M.D. Tenn. 1985), the Sixth Circuit reversed. It noted that shortly after this Court's decisions in Brown I[2] and II,[3] Tennessee statutes requiring school segregation were declared invalid by the State's Supreme Court;[4] that Tennessee state educational authorities were not thereafter made parties to the desegregation

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[2]Brown v. Board of Education, 347 U.S. 483 (1954).

[3]Brown v. Board of Education, 349 U.S. 294 (1955).

[4]See 836 F.2d at 994, citing Roy v. Brittain, 201 Tenn. 140, 297 S.W.2d 72 (1956).

lawsuits against Nashville[5] and Davidson County[6] which were eventually consolidated in the Kelley action; that no post-Brown violations contributing to the perpetuation of school segregation were proved against state authorities and no relief was granted against them at earlier stages of the Kelley litigation; and that the district court's judgment on the third-party complaint was not based upon any post-Brown segregative conduct of state officials. See 836 F. Supp. at 989-90, 993-94. Under these circumstances, the Sixth Circuit held, the Eleventh Amendment barred the district

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[5]Kelley v. Board of Education of Nashville, Civ. No. 2094 (M.D. Tenn.); see id., 3 Race Rel. L. Rep. 15, 17 (M.D. Tenn. 1957)(school board invites Attorney General of State to appear as amicus curiae).

[6]Maxwell v. County Board of Education of Davidson County, Civ. No. 2956 (M.D. Tenn.); see id., 5 Race Rel. L. Rep. 1040, 1041 (M.D. Tenn. 1960)(no state officials named as defendants in case).

court's entry of an Order requiring fiscal contribution from the State to the local school district.[7]

This case is distinguishable from Kelley on two grounds. First, the Arkansas State Board of Education was joined as a party when this lawsuit was commenced in 1982.[8] All of the relief ordered against

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[7]The same result has been reached, although not explicitly on Eleventh Amendment grounds, by the Eighth Circuit and the Fifth Circuit. See United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986)(order requiring state contribution to cost of desegregation plan reversed where hearings on state liability never held and findings on state liability never made); United States v. Texas Education Agency, 790 F.2d 1262, 1264 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 874 (1987)(school board effort to obtain contribution from state authorities toward cost of desegregation remedy properly denied where remedy order "seems to indicate unmistakably that the only culpable party was the [local district]").

[8]The scope of state involvement in, and responsibility for, school segregation in Pulaski County was not fully litigated

(continued...)

the State Board by the district court in 1984,[9] by the en banc Court of Appeals in 1985,[10] and by the Court of Appeals in the decision below, of which Petitioners seek

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[8](...continued)

prior to the filing of this case. The relief previously granted against state officials in proceedings ancillary to a school desegregation action involving the Little Rock School District, e.g., Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), aff'd sub nom. Faubus v. United States, 254 F. 2d 797 (8th Cir. 1958), was limited and prohibitory in nature; it was based upon direct state interference with the execution of the federal district court's remedial orders. The findings of the courts below, however, delineate the long-maintained deliberate efforts of state authorities to thwart constitutionally mandated desegregation after Brown. See cases cited infra nn.9 & 10.

[9]Little Rock School District v. Pulaski County Special School District, 597 F. Supp. 1220 (E.D. Ark. 1984); see also id., 584 F. Supp. 328 (E.D. Ark. 1984).

[10]Little Rock School District v. Pulaski County Special School District, 778 F.2d 404 (8th Cir. 1985), cert. denied, ____ U.S. ____, 106 S. Ct. 2926 (1986).

review,[11] is grounded upon a record demonstrating -- and findings of -- intentionally discriminatory conduct by state officials which exacerbated and perpetuated unlawful school segregation in violation of the Fourteenth Amendment, long after the Brown decisions. In the absence of such findings, it is clear that the court below would not have required the monetary contribution toward a comprehensive remedy which Petitioners now attack. See United States v. Arkansas, supra note 7.

Second, this litigation involves a claim by plaintiff-intervenors Joshua, et al., black schoolchildren and their parents, that complete relief to eliminate the

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[11] Little Rock School District v. Pulaski County Special School District, 839 F.2d 1296 (8th Cir. 1988), pet. for cert. filed, 57 U.S.L.W. 3007 (U.S. June 20, 1988).

remaining vestiges of the dual school system within and among the three school districts in Pulaski County, Arkansas can be achieved only with the participation and resources of state, as well as local authorities. The courts below sustained this claim several years ago, and this Court declined to disturb their determinations. See supra notes 9 & 10. Thus, this case could not be more different from Kelley, where the Court of Appeals for the Sixth Circuit said:

> It bears emphasis that we are not here called upon to adjudicate the rights of plaintiffs suing to obtain the equal educational opportunities promised them in Brown . . . .

836 F.2d at 989.

There is no conflict between the ruling below and the Sixth Circuit's decision in Kelley, and the instant Petition should be denied.

II

The State Did Not Raise Below Its Argument That A Federal Court May Not Require Monetary Contribution By State Authorities To A Desegregation Remedy Without First Finding That Local School Districts Are Unable To Pay The Costs of the Remedy

Petitioners argue that this Court should determine the question whether a federal court may order any remedy involving financial contribution by state agencies to the costs of a desegregation plan without first making a finding that the local jurisdiction is otherwise unable to implement the remedy.[12] This, Petitioners claim, is the approach taken by the Sixth Circuit in Kelley.

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[12]Petitioners' statement of the Questions Presented includes this issue as part of their formulation of the Eleventh Amendment question (Petition, at i) but Petitioners treat it as a separate argument in support of granting the Writ (see id. at 10-12).

Petitioners did not raise this claim in the Court of Appeals.[13] It is therefore

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[13]There is only one off-hand reference to the issue in the State Board of Education's Petition for Rehearing and Suggestion for Rehearing En Banc:

> This expansion of the 1985 remedy levied against the State Board is substantial and comes without any findings of fact to establish that these programs are needed, or if needed, that the LRSD is unable to fund them from its own resources.

Id. at 5. The Certificate of Counsel required by 8th Cir. Rule 16(d), however, did not identify the issue as one requiring decision:

> (2) I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:
>
> (a) Whether the extensive remedies now sought to be imposed upon the State Board of Education exceed the scope of its constitutional violations contrary to the Supreme Court's ruling in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).

(continued...)

not properly presented for review in the present Petition. E.g., Delta Airlines, Inc. v. August, 450 U.S. 346, 362 (1981); see, e.g., Youakim v. Miller, 425 U.S. 231, 234 (1976).

Moreover, Petitioners failed to raise the question when they sought review of the en banc Court of Appeals' 1985 decision which instructed (without determining that the local school system could not afford the remedy), that the "additional cost of [compensatory and remedial] programs [in the Little Rock district] shall be paid for by the State of Arkansas," 778 F.2d at

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[13](...continued)

> (b) Whether the order for extensive additional funding by the State Board of Education violates the Eleventh Amendment to the United States Constitution under Milliken v. Bradley, 433 U.S. 267 (1977).

Petition for Rehearing and Suggestion for Rehearing En Banc, at iii.

435; Supplemental Appendix to Petition for Writ of Certiorari, at 114.[14] They have accordingly waived their right to seek review on the issue at this time.[15]

Even if that were not the case, there is no inconsistency between the holding below and the approach of the Sixth Circuit in Kelley. Nothing in the Kelley opinion suggests that the Sixth Circuit would disapprove an order that required state authorities, who themselves had violated the Fourteenth Amendment, to participate in the implementation of an adequate remedy, through financial contribution or otherwise. The Sixth Circuit approved such orders in

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[14] See Petition for Writ of Certiorari, No. 85-1547.

[15] See also Petition, at 15 (" . . . the State Board . . . believed it was completely satisfying its constitutional obligations by stipulating to and funding the implementation of various magnet schools and other remedies required of it by the 1985 opinion")(emphasis supplied).

Columbus Board of Education v. Penick, 663 F.2d 24 (6th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); Reed v. Rhodes, 662 F.2d 1219 (6th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

The discussion in the Kelley opinion about the local school district's ability to implement a court-ordered desegregation remedy without fiscal assistance from state authorities appears immediately after the court's language emphasizing that the plaintiff black schoolchildren in Kelley made no claims against the State. See 836 F.2d at 989-90. In that context, the discussion in Kelley implies that the Sixth Circuit would require monetary contribution by state authorities, even in the absence of findings of state liability such as were made here, if the local district could not adequately fund a program of relief which was constitutionally required in order

to vindicate the rights of the minority pupils.

In view of the extensive constitutional violations which the courts below found to have been committed by Petitioners, their claim to immunity from orders requiring them to participate, along with local school systems, in redressing the continuing effects of those violations is plainly insubstantial and does not merit plenary review by this Court.

III

The Court Of Appeals' Clarification Of Its 1985 Ruling Did Not Improperly Expand The Scope Of The Remedy Nor Incorrectly Disregard The Findings Of The District Court

In a final attempt to contrive a justification for granting review of the decision below, Petitioners assert that the panel's opinion improperly "expanded"

the scope of the State Board's remedial obligations beyond that imposed by the earlier en banc opinion in 1985 and failed to give appropriate "deference" to the district court's conclusions concerning the appropriate scope of the remedy required by that earlier opinion. These representations are completely without foundation; in any event, they hardly represent the type of important, recurring question that demands the time and attention of this Court. See Sup. Ct. Rule 17.

The decision below marked no departure from the earlier holding of the en banc court. The panel merely clarified the intended meaning of the phrase "all- or nearly all-black" used in the 1985 en banc decision, which had been construed too narrowly and literally by the district

court on remand from that ruling. See 839 F.2d at 1307; Pet. App. at A-25.[16]

Petitioners pressed their interpretation by seeking rehearing of the panel's ruling by the en banc Court of Appeals, but it was denied without dissent (Pet. App. at A-1). It is thus reasonable to conclude that the judges who joined the majority opinion for the en banc court in 1985 accept the interpretation adopted and clarified by the panel.

Similarly, what Petitioners characterize as the district court's "finding" ("that this is not an appropriate case for State funding of compensatory and remedial education programs" (Pet. at

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[16]Similarly, the panel opinion clarified the intentions of the en banc court in establishing remedial guidelines for student assignment in Pulaski County. 839 F.2d at 1304-05; Pet. App. at A-19 to A-20.

18)),[17] to which the court below ostensibly failed to give appropriate deference, rested entirely upon the very misconstruction of the en banc court's opinion that the decision below corrected. Under these circumstances, there was no violation of the "clearly erroneous" rule[18] because the trial court's statement is not a factual finding, and even if it were, it was obviously the product of a mistake of law. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); United States v. United States Gypsum Company, 333 U.S. 364, 394 (1948).

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[17]The district court said (Petition at 18, quoting 659 F. Supp. at 366):

> Since there are no all-black schools in the LRSD student assignment plan, the conditions are not present which would trigger state financing of compensatory education as is obvious from the above language [from the 1985 en banc opinion, 778 F.2d at 435].

[18]See Petition at 19 n.5.

Conclusion

In Milliken v. Bradley, 433 U.S. 267, 287-88 (1977), this Court recognized that:

> Children who have been [as a result of a constitutional violation] educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition . . . must be treated directly by special training at the hands of teachers prepared for that task.

The clarification of the 1985 en banc opinion made by the panel below, and its remedial instructions to the district court, are faithful to that principle. See 839 F.2d at 1308. There is no basis for review

by this Court, and respondents respectfully pray that the writ be denied.

Respectfully submitted,

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